

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

3 WSOU INVESTMENTS LLC * March 25, 2021
4 VS. * CIVIL ACTION NOS.
5 GOOGLE LLC * W-20-CV-571 thru 585

BEFORE THE HONORABLE ALAN D ALBRIGHT
TELEPHONIC SCHEDULING CONFERENCE

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09:01 1 (March 25, 2021, 9:01 a.m.)

09:01 2 DEPUTY CLERK: Markman Hearing in Civil Actions

09:02 3 W-20-CV-584, 585, 571, 572, 573, 574, 575, 576, 577, 578, 579,

09:02 4 580, 581, 582, 583 and 584, all styled WSOU Investments LLC

09:02 5 versus Google LLC.

09:02 6 MR. SIEGMUND: Good morning, Your Honor. This is Mark

09:02 7 Siegmund for plaintiff WSOU Investments LLC.

09:02 8 Also with me this morning is James, also known as "Jim"

09:02 9 Etheridge. We have Ryan Loveless. And our three main speakers

09:03 10 today addressing the claim terms are going to be Mr. Brett

09:03 11 Mangrum, Jeff Huang and Brian Koide.

09:03 12 MR. JONES: Your Honor, on behalf of defendant Google,

09:03 13 this is Mike Jones. Our speakers will be Greg Lanier, Joe

09:03 14 Sauer, Michael Lavine, Sanjiv Laud, Marlee Hartenstein, Matt

09:03 15 Warren and Jen Kash.

09:03 16 And also on the line for Google itself, corporate

09:03 17 representatives are John Colgan, Joe Shear and Timur Engin.

09:03 18 And Mr. Lanier can tell you, if the Court desires, the

09:03 19 speakers that will speak as to the terms in the order that the

09:03 20 Court has provided to us.

09:03 21 Thank you, Your Honor.

09:03 22 THE COURT: Thank you, Mr. Jones. Thank you to the

09:03 23 clients who have taken the time to attend.

09:03 24 Let me apologize to those who are in California, if any

09:03 25 are. We try to schedule these things so they're not so early,

09:03 1 but with the number of claim terms we have this morning, we
09:04 2 felt like we might need all day and we needed to get started by
09:04 3 9:00 to get done.

09:04 4 I'm told we have only 12 claim terms, which is still a
09:04 5 lot, so that's why we started at the time we did.

09:04 6 We will start with -- give me one second. The first claim
09:04 7 term I believe that we're going to take up is "continuous-wave
09:04 8 Doppler radar."

09:04 9 Let me hear from counsel for defendant with respect to
09:04 10 anything they'd like to say on this claim term and its
09:04 11 construction.

09:04 12 MR. LANIER: Thank you, Your Honor. This is Greg Lanier
09:04 13 of Jones Day. I am in California, but the sun is up, so we'll
09:04 14 survive just fine. We do appreciate Your Honor accommodating
09:04 15 our request to do this by Zoom.

09:04 16 My partner Joe Sauer will handle this term.

09:04 17 THE COURT: I worry that you are subliminally trying to
09:04 18 get me to your side by having a guitar hanging in the
09:05 19 background of your room. I have some of those myself in
09:05 20 another room. But I just wanted you to know it's not going to
09:05 21 work. Even if you have a guitar up there, I'm still going to
09:05 22 be fair and impartial to everyone. So...

09:05 23 (Laughter.)

09:05 24 MR. LANIER: I will not tilt this toward the other wall of
09:05 25 guitars, so I will not try to take unfair advantage, Your

09:05 1 Honor.

09:05 2 THE COURT: Okay.

09:05 3 MR. LANIER: Mr. Sauer?

09:05 4 MR. SAUER: Thank you. Good morning, Your Honor. Joe
09:05 5 Sauer for Google.

09:05 6 Jason, if we could put the slides up and start with Slide
09:05 7 2, that would be great.

09:05 8 Your Honor, I'm going to be really brief with this term.

09:05 9 And unless Your Honor has -- would like a refresher on the '825
09:05 10 patent or has any questions on the technology here, I can jump
09:05 11 right to the claim construction.

09:05 12 THE COURT: No. You can jump. But let me tell you, at
09:05 13 least on this one, you start off with a little bit of a
09:05 14 hurdle -- or actually a pretty good hurdle.

09:05 15 One of the things that we do in the office, for better or
09:05 16 worse, is when I see a claim term like this one that looks to
09:06 17 me like it's probably pretty well-known in the industry, I'll
09:06 18 Google it just to see if -- you know, I sit there and say, wow.
09:06 19 Continuous wave Doppler radar.

09:06 20 My guess is that's something when the inventor was
09:06 21 drafting this patent that doesn't seem very contentious. And I
09:06 22 looked it up, and there are about 1,000 hits, as it were, on
09:06 23 Google with this.

09:06 24 So on these I will tell you unless you can show me some
09:06 25 reason that there's something in the patent that requires me to

09:06 1 say that it emits an uninterrupted electromagnetic signal,
09:06 2 you're going to have a tough time with other than plain and
09:06 3 ordinary meaning.

09:06 4 And let me also start off because I've done this a lot
09:07 5 lately. Occasionally what happens -- not occasionally. Often
09:07 6 what happens is what you are about to tell me is that, Judge,
09:07 7 we know that continuous-wave Doppler radar really does have a
09:07 8 plain and ordinary meaning, but what we're worried about is we
09:07 9 have the plaintiff's infringement contentions. And we can tell
09:07 10 from what they're doing that they're not using the plain and
09:07 11 ordinary meaning. So you've got to construe it the way we say
09:07 12 because they're not following plain and ordinary meaning, and
09:07 13 we want to take care of that now.

09:07 14 And I will tell you, if it saves us time on the other
09:07 15 claim terms, in my opinion, claim construction on something
09:07 16 that's plain and ordinary meaning is not the time to be
09:07 17 prophylactic about what you all are doing.

09:07 18 If down the road -- I'll pick on the plaintiff for a
09:07 19 second. If down the road the plaintiff submits to Google its
09:08 20 infringement -- I'm sorry -- its expert report on infringement
09:08 21 and at that time you can persuade me that when the expert says
09:08 22 that the product infringes they are not using the plain and
09:08 23 ordinary meaning, I'll seriously take it up.

09:08 24 I'll point out to everyone that in the recent trial I had
09:08 25 in Intel, originally that was a three-patent case. And it was

09:08 1 a two-patent case at trial because I granted a motion for
09:08 2 summary judgment of noninfringement.

09:08 3 In my court I take motions for summary judgment and
09:08 4 Daubert motions and motions in limine very seriously. And in
09:08 5 my -- that's where I -- I believe these kind of battles need to
09:08 6 be waged once I actually know what the plaintiff is going to
09:08 7 say in their expert report on infringement and you're going to
09:08 8 say in your reports on invalidity.

09:08 9 So if you have something that you need to add with this
09:09 10 one -- and I'm sorry for this long lecture, but this is true
09:09 11 with, you know, a number of these claim terms, as I look down
09:09 12 at them, "tap direction," "broadcast," the "input image."

09:09 13 These seem to me to be plain and ordinary meaning and not
09:09 14 needing to be construed in the manner that defendant wants,
09:09 15 absent some very good arguments we didn't see in the briefing
09:09 16 as to why the claim terms should be constrained in the manner
09:09 17 that you all have suggested.

09:09 18 So I know I've put a burden on you, but I feel like
09:09 19 transparency in what I'm thinking is better for you and your
09:09 20 clients than have you talk about some stuff that I may or may
09:09 21 not care about and not get right to the issues that I do.

09:10 22 I think we've had over 100 Markmans now. I figure it's
09:10 23 best to let you all know exactly what is important to me and
09:10 24 what is not. So after that long speech, which I apologize for,
09:10 25 I'm happy to hear any arguments that you want to make.

09:10 1 MR. SAUER: Thank you, Your Honor.

09:10 2 In view of that helpful advice and Your Honor's advice to
09:10 3 focus on -- today on fine-tuning your preliminary
09:10 4 constructions, we're going to go ahead and jump right to
09:10 5 Slide 10.

09:10 6 THE COURT: Okay.

09:10 7 MR. SAUER: And we're not going to continue to argue our
09:10 8 original construction in view of Your Honor's advice this
09:10 9 morning.

09:10 10 THE COURT: And let me -- I'm sorry. Let me interrupt you
09:10 11 one more time.

09:10 12 And I want to make the record very clear to protect your
09:10 13 client. I allow you all to maintain the constructions that you
09:10 14 proffered. I understand that you are objecting to me giving
09:10 15 plain and ordinary meaning. I encourage you all to try and, as
09:10 16 you said and I say often, fine-tune.

09:11 17 But I want to make the record clear that your original
09:11 18 proposed construction is what you believe is correct, and
09:11 19 you're only -- we're only doing this in light of your efforts
09:11 20 to try and help me come up with a claim construction.

09:11 21 But I want the record to be clear that as far as I'm
09:11 22 concerned, your client's rights are protected with respect to
09:11 23 the claim terms that you all proposed.

09:11 24 So, again, I've interrupted you like four times now. I
09:11 25 try not to do that, but hopefully it will make the record

09:11 1 better for both sides.

09:11 2 MR. SAUER: That's fine. Thank you, Your Honor.

09:11 3 We do agree with our original construction, but in view of
09:11 4 your preliminary construction, I want to get right to just a
09:11 5 small suggestion to clarify the plain and ordinary meaning
09:11 6 based on aspects that we think that both parties are in
09:11 7 complete agreement here, Your Honor. And that's a continuous
09:11 8 wave Doppler radar is not pulsed.

09:12 9 And I've highlighted on the slide for you this morning,
09:12 10 Your Honor, the plaintiff's claim construction briefing.

09:12 11 Plaintiffs repeatedly acknowledged in its briefs, Your Honor,
09:12 12 that the '825 patent discloses two types of Doppler radar,
09:12 13 continuous and pulsed, but that the claims only recite
09:12 14 continuous wave.

09:12 15 And we're in full agreement with this, Your Honor.

09:12 16 So similar to what Your Honor did recently in the Markman
09:12 17 orders in the Microsoft cases, we just suggest a minor
09:12 18 modification to the tentative construction just for clarity,
09:12 19 making the construction plain and ordinary meaning, wherein the
09:12 20 plain and ordinary meaning is not pulsed.

09:12 21 And with that said, Your Honor, that's all we have to say
09:12 22 on this claim this morning.

09:12 23 THE COURT: Mr. Mangrum, I'll pick on you, but I know it
09:12 24 might be you or Mr. Huang or possibly someone else, but I'll
09:12 25 start with you.

09:12 1 MR. MANGRUM: Good morning, Your Honor. This is Brett
09:12 2 Mangrum.

09:12 3 I believe for this term one of my colleagues will be
09:13 4 addressing this particular term.

09:13 5 MR. KOIDE: Your Honor, this is Mr. Koide. I'll be
09:13 6 addressing this term.

09:13 7 THE COURT: Good morning. Welcome back.

09:13 8 MR. KOIDE: Good morning, Your Honor. Thank you.

09:13 9 THE COURT: I think it's been almost two days since we've
09:13 10 been together.

09:13 11 MR. KOIDE: Exactly. Right, Your Honor. I feel like it's
09:13 12 Ground Hog Day a little bit. I'm sure you do as well.

09:13 13 So we don't want to belabor this point. We largely agree
09:13 14 with what Your Honor was saying in -- I think Your Honor stole
09:13 15 the thunder of most of our points in that this is a
09:13 16 well-recognized term of art.

09:13 17 We cited to both a Wikipedia article and also a training
09:13 18 manual that shows that continuous-wave Doppler radar is a
09:13 19 recognized category. And we're entitled to that full scope of
09:13 20 that category.

09:13 21 The concern we have that has been addressed in our briefs,
09:13 22 and I don't want to regurgitate it here, but it seems that
09:13 23 Google is trying to carve out a well-recognized subcategory of
09:14 24 continuous-wave Doppler radar called a frequency modulated one
09:14 25 where the frequency is varied. And they seem to be kind of

09:14 1 getting a back end to it.

09:14 2 So I don't exactly know where they're going. But the
09:14 3 point -- we just largely agree with Your Honor. It's a
09:14 4 well-recognized term. A POSITA would recognize what it is.
09:14 5 There's no reason to then kind of clarify and say something
09:14 6 it's not when it's a well-recognized term. A POSITA would
09:14 7 understand what this means, and we should get the full scope of
09:14 8 that.

09:14 9 And that's basically our argument, Your Honor.

09:14 10 THE COURT: Any response from defense?

09:14 11 MR. SAUER: Just quickly, Your Honor. Not to take too
09:14 12 much time on this term this morning.

09:14 13 THE COURT: Let me -- this is as far as I go if I will,
09:14 14 say, chastise someone. I'm pretty certain for everyone -- I'm
09:14 15 pretty certain I've lost more time in my life on the bench by
09:14 16 people saying "very quickly, Your Honor. I won't take much of
09:14 17 your time."

09:14 18 (Laughter.)

09:14 19 THE COURT: I think somewhere if I were on ESPN I could
09:15 20 actually give you a statistic of how much time I've lost.

09:15 21 You all have done -- I enjoy these hearings very much. I
09:15 22 don't put time limits on them. We have a whole day for this,
09:15 23 and I don't think we'll have to take it because of the claim
09:15 24 terms. You all have as much time as you'd like to take to
09:15 25 argue these things.

09:15 1 And I enjoy these hearings very much. So...

09:15 2 MR. SAUER: Well, thank you, Your Honor. And I will try
09:15 3 to be really short here because at bottom we are okay with
09:15 4 plain and ordinary meaning.

09:15 5 We do believe, though, that the plain and ordinary meaning
09:15 6 differentiates continuous wave from pulse. The patent's clear
09:15 7 about that. The prosecution history's very clear about that.
09:15 8 That was the distinction that was made during prosecution to
09:15 9 overcome the prior art.

09:15 10 We're not trying to play games here, Your Honor. We'd
09:15 11 just like to clarify this now because we anticipate that it
09:15 12 could become a dispute down the road. But if at the end of the
09:15 13 day Your Honor decides on plain and ordinary meaning, we can
09:15 14 live with that.

09:16 15 THE COURT: Well, here's what I'm going to do on this one,
09:16 16 this specific claim term. I understand the argument you all
09:16 17 are having.

09:16 18 I'm going to maintain plain and ordinary meaning, but
09:16 19 you -- both sides will have a couple of off-ramps. If when you
09:16 20 get the expert report from the plaintiff, if you believe that
09:16 21 the plaintiff's expert has taken a position that includes, for
09:16 22 lack of a better word, "pulse," and you think -- to -- if you
09:16 23 believe that -- whether he says pulse or not, but he says your
09:16 24 product infringes, and by doing that he is saying that it
09:16 25 includes pulse that -- which you believe it should not, you can

09:16 1 come to the Court and ask for a mini-Markman hearing so I can
09:16 2 clarify and tell you all whether or not I'm okay with that.

09:16 3 Or you can file a motion for summary judgment and say that
09:16 4 that is not the plain and ordinary meaning.

09:16 5 And I know -- I know that plaintiff's counsel has heard me
09:17 6 give this lecture because they're kind of frequent flyers in
09:17 7 some ways and they get to -- they appear in front of me a lot.
09:17 8 But I just say the parties should not be too greedy in what
09:17 9 they do on the infringement side or invalidity side with their
09:17 10 expert reports because if we get -- if you get to that point
09:17 11 where it's a motion for summary judgment, you're not going to
09:17 12 have -- be able to fix your report.

09:17 13 So I'm -- plaintiff's counsel has heard your position this
09:17 14 morning. They know that I'm aware of what your position is.
09:17 15 When they do their infringement analysis, they'll decide what's
09:17 16 best for their clients and do whatever they think is the
09:17 17 appropriate thing to do, and I will take it up. And we will --
09:17 18 we will take it up if you raise it and you think there's
09:17 19 something inappropriate -- inappropriate's the wrong word, but
09:17 20 incorrect, we will take it up before trial.

09:17 21 MR. SAUER: That's more than fair, Your Honor. Thank you.

09:17 22 THE COURT: The next claim term is -- and so folks know
09:18 23 who have not been on this call before, especially the clients,
09:18 24 because of Zoom, I wind up having three or four different
09:18 25 devices going at one time.

09:18 1 So if I look like I'm not paying attention to you all when
09:18 2 you're speaking, I'm going to one of my devices to figure out
09:18 3 what's -- what I'm looking at and also communicating with my
09:18 4 clerks. So I am paying attention.

09:18 5 The next claim term is "tap direction." And again the
09:18 6 Court has provided plain and ordinary meaning. I'm not sure if
09:18 7 you're going to continue to argue. But if you are, I welcome
09:18 8 to hear what you want to say.

09:18 9 MR. LANIER: Your Honor, it's Greg Lanier again. Jen Kash
09:18 10 of the Warren Lex firm will address this point.

09:18 11 Before Ms. Kash starts, just one quick point.

09:18 12 We really do appreciate Your Honor's clear direction and
09:18 13 transparency. It will inform the rest of the argument on a
09:18 14 couple of these terms and in general, but I just wanted to
09:18 15 express our collective appreciation for that, so...

09:19 16 Ms. Kash?

09:19 17 THE COURT: Well, maybe you should call some of the law
09:19 18 professors who are complaining about my lack of transparency
09:19 19 and tell them that your Yelp review is much, much better than
09:19 20 what I'm doing than theirs is.

09:19 21 At any rate, that was a joke. If any of the law
09:19 22 professors are listening, that was just a joke.

09:19 23 Ms. Kash?

09:19 24 MS. KASH: Good morning, Your Honor. Good to see you
09:19 25 again.

09:19 1 THE COURT: Good to see you again.

09:19 2 MS. KASH: You've already taken what was going to be a
09:19 3 very short argument to even shorter by your words.

09:19 4 One thing that is of concern to us is, unlike waiting for
09:19 5 a dispute on tap direction until the infringement contention --
09:19 6 infringement stage, we actually have the dispute somewhat in
09:19 7 the briefs that were submitted by the plaintiff in terms of the
09:19 8 ordinary meaning.

09:19 9 We agree with you that if you Google "tap," it means
09:19 10 something very specific. And so what we're trying to get an
09:19 11 understanding of is if the plain and ordinary meaning here is
09:19 12 that tap means tap.

09:19 13 And in the plaintiff's reply brief, they specifically
09:20 14 state that they think that our read of the tap being a lift-up
09:20 15 in some location and, therefore, limiting tap direction to
09:20 16 being the direction between taps in our construction that we
09:20 17 sought, they say that's an error.

09:20 18 And so we think this entire issue can and should be fairly
09:20 19 straightforward if tap is to mean tap, but we didn't -- we need
09:20 20 some guidance from the Court if that's its understanding as
09:20 21 well.

09:20 22 THE COURT: I'm not sure who's going to speak on behalf of
09:20 23 plaintiff.

09:20 24 MR. KOIDE: Your Honor, this is Mr. Koide again. I'm
09:20 25 speaking for this term as well.

09:20 1 THE COURT: Yes, sir.

09:20 2 MR. KOIDE: Okay. Again, I don't want to -- our main
09:20 3 point here is that it's a term that should be given its plain
09:20 4 and ordinary meaning to a POSITA, and so we agree with Your
09:20 5 Honor.

09:20 6 And I don't want to regurgitate the phrase, but the main
09:20 7 difference in the view of the specification's discussion of tap
09:20 8 is that Google views this discussion where it talks about
09:20 9 pointing, tapping and dragging all as mutually exclusive.

09:21 10 As we explained in our brief, they overlap. For instance,
09:21 11 you could, you know, tap on a screen and then drag, or point on
09:21 12 a screen and then drag. So they weren't meant to be these
09:21 13 three mutually exclusive categories.

09:21 14 And just, you know, even though the plain lay meaning of
09:21 15 tap is not necessarily the controlling, just to show it as an
09:21 16 analogy. This could be a tap, okay? This is what Google's
09:21 17 saying, a tap, lift, tap, lift. It's also if I tap someone on
09:21 18 the shoulder and go like this and keep it there, that's a tap
09:21 19 too.

09:21 20 So that's the main difference we have is that they're
09:21 21 trying to unduly limit it to a particular preferred embodiment,
09:21 22 and we think we're entitled to the broader context of tap
09:21 23 direction.

09:21 24 THE COURT: Well, let me suggest this on this one. Again,
09:21 25 I understand this is important stuff.

09:21 1 Why don't we do this? I don't know exactly when, but
09:21 2 there will be a time in the very near future when the plaintiff
09:22 3 will have to provide its infringement contentions that's --
09:22 4 it's set out in the schedule, but I'm not sure exactly when it
09:22 5 is.

09:22 6 If when the -- if when the plaintiff gives the defendant
09:22 7 its infringement contentions, if the defendant believes I need
09:22 8 to review and make sure that the position being taken by the
09:22 9 plaintiff on tap is consistent with plain and ordinary meaning,
09:22 10 I'll be happy to do that.

09:22 11 I will say, though, at this point that from what I read,
09:22 12 I'm in the -- for lack of a better word, I think tap is
09:22 13 something that ought to be given its full meaning, and I think
09:22 14 the plaintiff's position is perfectly reasonable in terms of it
09:22 15 being within the plain and ordinary meaning.

09:22 16 But we'll know more when you get the infringement
09:23 17 contentions, and you can contact the Court, and we can do a
09:23 18 quick hearing in that regard.

09:23 19 But I think tap direction, as far as I'm concerned, I
09:23 20 think you will -- I think Google should anticipate that it'll
09:23 21 be a fairly broad construction in plain and ordinary meaning of
09:23 22 what tap means.

09:23 23 And so let's move to the next claim term, which is
09:23 24 "communication traffic" and goes on. Again, the Court has
09:23 25 given plain and ordinary meaning.

09:23 1 Who will be speaking on behalf of the defendant?

09:23 2 Ms. Kash, I'll start with you, or Mr. Lanier or whoever.

09:23 3 MR. LANIER: Thank you, Your Honor. My colleague, Michael

09:23 4 Lavine, and Tracy Stitt, my other colleague, may also be

09:23 5 lurking about that. But Mr. Lavine will take point on this

09:23 6 issue. Thank you.

09:23 7 THE COURT: Okay.

09:23 8 MR. LAVINE: Good morning, Your Honor. Mike Lavine for

09:23 9 Google.

09:23 10 THE COURT: Mr. Lavine, I don't think I've had you in

09:23 11 front of me before, at least not by -- in an appearance.

09:24 12 Welcome to my Court. I appreciate you attending.

09:24 13 MR. LAVINE: Thank you. Glad to be here.

09:24 14 If you could bring up the slides.

09:24 15 All right. Let's switch to Slide 4.

09:24 16 So, Your Honor, in view of the Court's preliminary

09:24 17 construction and to narrow the issues related to the term,

09:24 18 Google is proposing that an alternative construction that

09:24 19 focuses only on the access communication link portion of this

09:24 20 term. So as you can see here --

09:24 21 THE COURT: Can you give me just one -- let me read it

09:24 22 real quick, and then I'll -- I can't read and listen at the

09:24 23 same time. Let me read what you've done real quick, and then

09:24 24 I'll get you started in just one second.

09:25 25 MR. LAVINE: Sure.

09:25 1 THE COURT: Mr. Lavine, thank you very much.

09:25 2 MR. LAVINE: All right. Let's turn to Slide 5.

09:25 3 So here I want -- I'd like to explain to the Court why
09:25 4 Google's construction should be adopted.

09:25 5 So the core of the dispute here is must the access
09:25 6 communication link connect to the communication network
09:25 7 subscriber?

09:25 8 Now, the plaintiff is saying no. They're arguing that
09:25 9 it's not necessarily connected to a subscriber, but this is
09:25 10 inconsistent with what the claims and the specification
09:25 11 actually say.

09:25 12 There are really two fundamental aspects of this
09:25 13 invention, which are repeatedly stated by the patent. The
09:26 14 first one is to monitor all of the communication networks
09:26 15 subscriber traffic over the access communication link and to
09:26 16 provide electronic content to the subscriber over that same
09:26 17 link through the access network.

09:26 18 However, you can't -- all the traffic can't be monitored
09:26 19 and the electronic content cannot be provided to the subscriber
09:26 20 unless that access communication link is in -- at a point in
09:26 21 the network where it can connect the subscriber to the actual
09:26 22 network.

09:26 23 And this point is set forth in the claim language itself,
09:26 24 which you see here on the right. The communication traffic
09:26 25 exchanged with the subscriber is monitored as it travels across

09:26 1 the access communication link. That same link enables the
09:26 2 subscriber to access the electronic content. That link is in
09:26 3 an access network which contains the content source that
09:26 4 delivers content to the subscriber over that link.

09:26 5 And if you turn to Slide 6, we can see more of the key
09:27 6 evidence in the specification that underscores Google's
09:27 7 position.

09:27 8 Looking at Figure 2 at the top part of the slide, this is
09:27 9 a magnification of a portion of Figure 2 from the patent. And
09:27 10 you see highlighted in blue, there's an Item 26. That is the
09:27 11 access communication link, and it is the only place that a
09:27 12 patent identifies as a location for the access communication
09:27 13 link.

09:27 14 The specification also repeatedly and consistently places
09:27 15 that link, that access communication link directly between the
09:27 16 subscriber and the access network.

09:27 17 In particular, if you look at Column -- on the bottom left
09:27 18 to Column 7, Lines 61 to 67, it reads here that the
09:27 19 "interactions between the subscriber and the electronic content
09:27 20 source are enabled by the access communication link through the
09:27 21 access network."

09:27 22 And further down in that call-out it reads that "all of
09:27 23 the online traffic that is exchanged with the subscriber
09:27 24 traverses the access communication link."

09:28 25 So there's no doubt that there's -- there has to be a

09:28 1 connection between the communication network subscriber and the
09:28 2 access network.

09:28 3 And finally --

09:28 4 THE COURT: Mr. Lavine?

09:28 5 MR. LAVINE: Yes.

09:28 6 THE COURT: If I could have you -- I'm going to let you
09:28 7 finish and say whatever you want, but if we could flip to
09:28 8 whoever's going to speak for the plaintiff. And I'll let
09:28 9 you -- plaintiff do whatever they want once it's your turn, but
09:28 10 if you could address real quickly while we have this slide up
09:28 11 what's shown on Column 5 (sic), at Lines 36 to 38, and respond
09:28 12 to where it says, "In a typical ISP scenario, all of the online
09:28 13 traffic that is exchanged with the subscriber 22 traverses the
09:28 14 access communication to link 26."

09:28 15 And then, Mr. Lavine, I'll let you respond back, if I
09:28 16 could hear from plaintiff.

09:29 17 I'm not sure who just responded for plaintiff, but at
09:29 18 least I can't hear them.

09:29 19 Mr. Lanier, can you hear me?

09:29 20 MR. LANIER: Yes, Your Honor. I can hear Your Honor and
09:29 21 Mr. Lavine. I could not hear anyone for plaintiff.

09:29 22 THE COURT: Well, then let's do this. Let's go ahead and
09:30 23 have Mr. Lavine finish. And maybe we can -- and if y'all can
09:30 24 remember when you come back to that slide, I'd like to hear on
09:30 25 that.

09:30 1 But let's let -- Mr. Lavine, if you'd finish, and I'll
09:30 2 hear from the plaintiff and hopefully we'll get back on audio.

09:30 3 MR. LAVINE: Yes, Your Honor.

09:30 4 Let's turn to Slide 7.

09:30 5 So one of the plaintiff's arguments is that Google's
09:30 6 construction precludes having the access communication link in
09:30 7 the access network, but that argument really is not supported
09:30 8 by the specification.

09:30 9 And here we focus again on Figure 2, which is magnified to
09:30 10 show that connection between the subscriber and the access
09:30 11 network. You can see that the access communication link
09:30 12 clearly is between the subscriber and the access network. But
09:30 13 it's also part of it that is inside the access network itself.

09:30 14 So the link can exist both between and in the access
09:30 15 network. But even if the Court takes issue with the word
09:30 16 "between" for describing the link, we can use the word
09:30 17 "connected" instead. So the construction of "access
09:31 18 communication link" becomes a network link connecting the
09:31 19 communication network subscriber and the access network.

09:31 20 But regardless of whether you use "between" or
09:31 21 "connecting," the key takeaway is that based on the claims in
09:31 22 the specification, the access communication link must connect
09:31 23 the subscriber and the access network.

09:31 24 So that's all we have on this term, Your Honor.

09:31 25 THE COURT: Thank you, Mr. Lavine. Well done.

09:31 1 Is -- for the plaintiff?

09:31 2 MR. MANGRUM: Your Honor, this is Brett Mangrum for the
09:31 3 plaintiff. If we can put that slide back up, and I apologize
09:31 4 for not speaking earlier. We had a disconnect on our side with
09:31 5 respect to who would be addressing.

09:31 6 So keeping in mind that we were just informed that this
09:31 7 would be one of the terms that they wanted to address, I think
09:31 8 the -- the salient point from the quotation that Your Honor
09:31 9 raised is that the phrasing itself in that disclosure says
09:31 10 "typically." And that's a signal that's used by patent
09:32 11 practitioners to make clear that what follows is exemplary
09:32 12 disclosure.

09:32 13 And when you have things such as "typically" or "for
09:32 14 example" or "in some embodiments" or "in certain embodiments"
09:32 15 or "in this embodiment," these are ways in which patent
09:32 16 drafters signal to the reader that what follows is exemplary.
09:32 17 It pertains to a specific example and is not meant to be read
09:32 18 in as a claim limitation.

09:32 19 Now, that type of phraseology within patent drafting is
09:32 20 often juxtaposed by the courts in instances where a patentee
09:32 21 makes very clear that a certain description that follows is
09:32 22 intended to be limiting.

09:32 23 And oftentimes that appears in languages such as "must,"
09:32 24 "the present invention must." And quite often it's simply
09:33 25 expressed in the claim language itself.

09:33 1 So our concern, and we've seen this throughout the
09:33 2 briefing Google's offered, is that in many instances you have
09:33 3 this explanatory language, to an example "embodiment" signaled
09:33 4 by languages such as "typically" or "for example." And Google
09:33 5 has then read in that exemplary disclosure as a claim
09:33 6 limitation.

09:33 7 And in our briefing in every instance that's happened,
09:33 8 we've attempted to draw Your Honor's attention to the Phillips
09:33 9 counsel against reading in claim limitations -- sorry --
09:33 10 importing claim limitations from the specification into a claim
09:33 11 term as a cardinal sin.

09:33 12 We've also pointed Your Honor to case law that says this
09:33 13 is improper to do even in those instances -- which is not the
09:33 14 case here -- where only a single embodiment is disclosed.

09:34 15 So, again, we would submit that in asking us to focus on
09:34 16 this particular statement, the word "typically" actually
09:34 17 undercuts Google's position and favors plain and ordinary
09:34 18 meaning that's not so limiting.

09:34 19 (Clarification by the reporter.)

09:34 20 THE COURT: Mr. Lavine?

09:34 21 MR. LAVINE: Yes, Your Honor. I think the focus on the
09:34 22 word "typical" really doesn't address the issue here.

09:34 23 Like I said, the main point is -- of this invention, of
09:34 24 this patent is to monitor all of the subscriber's communication
09:34 25 traffic.

09:34 1 If you adopt the plaintiff's position, that really
09:34 2 detaches the subscriber from the rest of the network in a way
09:34 3 that doesn't make sense. Because without that link between the
09:34 4 subscriber and the access network, you can't monitor that
09:35 5 traffic, and you can't provide them the content.

09:35 6 And the whole point of this patent is to use that traffic,
09:35 7 monitor that traffic and create a profile that is used to
09:35 8 provide targeted content to the subscriber. That link is
09:35 9 essential, and it must under all circumstances exist between
09:35 10 the subscriber and the access network.

09:35 11 THE COURT: Any response?

09:35 12 MR. MANGRUM: Yes, Your Honor. Brett Mangrum for patent
09:35 13 owner.

09:35 14 Again, the purpose of claim construction is to not provide
09:35 15 within a -- an interpretation of a specific claim term -- an
09:35 16 explanation of how the invention is supposed to operate.

09:35 17 Nor is it an opportunity to suggest that in the absence of
09:35 18 some type of additional instruction or interpretation or
09:35 19 limitation, the claims would not operate as intended.

09:35 20 Those questions of interoperability go to not claim
09:35 21 construction but another statutory requirement. And we would
09:36 22 submit that we've heard nothing today nor in the briefing that
09:36 23 would compel -- and, again, the standard -- sorry -- would
09:36 24 compel the limitations they're seeking to require.

09:36 25 And the standard here when you're attempting to read in

09:36 1 "exemplary disclosure" as a claim limitation is that the
09:36 2 intrinsic evidence must -- and I'm quoting here --
09:36 3 "unambiguously require" the limitations being sought.

09:36 4 What we just heard is, well, don't pay attention to the
09:36 5 word "typically" and look at the rest of the disclosure.

09:36 6 But you have to. You have to consider what the patentee
09:36 7 said because in this instance words matter. And they signal an
09:36 8 intent to give an explanatory description of something that's
09:36 9 not limiting but simply a fulsome description of how things
09:36 10 would operate according to a particular embodiment.

09:36 11 It is very important. The standard's clear. And the
09:36 12 attempt to import something just to make a claim -- allegedly
09:37 13 make a claim inoperable under the term -- under an argument
09:37 14 offered by an attorney and not by an expert, we think doesn't
09:37 15 meet the exacting standard here to import a limitation.

09:37 16 THE COURT: The Court is going to maintain its preliminary
09:37 17 construction of plain and ordinary meaning.

09:37 18 Given what I've said earlier and what we've discussed, is
09:37 19 there any need -- I'll ask counsel for the defendant. Is there
09:37 20 any need to take up "broadcast" and "broadcasting"?

09:37 21 MR. LANIER: Your Honor, Ms. Stitt will address that
09:37 22 extremely briefly in view of Your Honor's guidance.

09:37 23 (Laughter.)

09:37 24 THE COURT: Okay.

09:37 25 MR. LANIER: Thank you.

09:37 1 MS. STITT: Good morning, Your Honor. Tracy Stitt
09:37 2 representing Google. Pleasure to be here, and I will cut
09:37 3 straight to the point.

09:37 4 So, Jason, if you could please put up Slide 3.

09:38 5 With Your Honor's previous guidance, we understand the
09:38 6 position. And the sole purpose for raising this term was to
09:38 7 request a clarification of the plain and ordinary meaning, and
09:38 8 that is to resolve what we feel is an issue and dispute based
09:38 9 on a statement in the plaintiff's brief. And that is whether
09:38 10 "broadcasting" means transmission to all receivers in the
09:38 11 network.

09:38 12 In their brief plaintiffs indicated that it does not
09:38 13 necessarily require transmission to all receivers in a network.
09:38 14 The claim language and the specification as we've cited we
09:38 15 believe does require that. And so for that reason we request
09:38 16 the clarification that the plain and ordinary meaning, which is
09:38 17 "transmission to all receivers in a network."

09:38 18 THE COURT: Well, I know what you would like. I don't
09:38 19 think this is -- based on their briefing, I really don't think,
09:38 20 though, until the plaintiff's expert has taken a position with
09:38 21 respect to what infringement is or is not, that -- I don't
09:39 22 think this -- I think broadcasting means broadcasting.

09:39 23 And I know that the plaintiff -- you've each done your
09:39 24 briefing, but I think it's just plain and ordinary meaning.
09:39 25 And, again, it's something that, you know, we'll take up down

09:39 1 the road if necessary.

09:39 2 And let me add one more thing, though, that I also think
09:39 3 on a claim term like "broadcasting," I don't think that -- this
09:39 4 is my opinion. The Circuit may tell me ultimately I'm wrong.
09:39 5 I don't think that you get to -- and I'm not saying you said
09:39 6 the words "02 Micro," but I don't think you get to create an
09:39 7 02 Micro situation by taking a word that's -- like
09:39 8 "broadcasting" and having a difference of opinion.

09:39 9 It may very well be in this case that if the parties take
09:39 10 different positions with respect to what the plain and ordinary
09:39 11 meaning of "broadcasting" is, I may very well decide that
09:39 12 that's an issue that a jury can take up as well.

09:40 13 But I'm going to maintain plain and ordinary meaning for
09:40 14 "broadcasting."

09:40 15 Let me see what the next claim term is.

09:40 16 It is "the input image," and, again, it appears that
09:40 17 Google would like to take this and have me insert the words
09:40 18 "the original input image."

09:40 19 But I will allow Google's counsel to tell me why it is
09:40 20 that I should take a claim term like "the input image" and give
09:40 21 it anything other than its plain and ordinary meaning.

09:40 22 MR. LANIER: Your Honor, Matt Warren of the Warren Lex
09:40 23 firm will address this term and the other terms in the '491
09:40 24 patent.

09:40 25 THE COURT: Okay. Mr. Warren, I don't think I've had you

09:40 1 appear in front of me either, at least not by person -- by
09:40 2 video. I welcome you to my court.

09:41 3 MR. WARREN: Good morning, Your Honor. And thank you.

09:41 4 This is my first appearance before Your Honor, and I'm honored
09:41 5 to be here.

09:41 6 Jason, if you could put up the slide.

09:41 7 Your Honor, in light of the Court's tentative, we're not
09:41 8 going to contest at this time. Obviously, we'll reserve our
09:41 9 rights.

09:41 10 The original construction -- I do want to ask one
09:41 11 clarification about the plain and ordinary meaning.

09:41 12 And, Jason, if you could go one slide forward.

09:41 13 Our understanding of the plain and ordinary meaning of an
09:41 14 input image, whatever else it includes, is that every instance
09:41 15 of "the input image," using the normal patent rules of
09:41 16 antecedent basis, refers back to "an input image" at the
09:41 17 beginning of the claim.

09:41 18 The plaintiff has stated in its claim construction
09:41 19 briefing that it does not agree.

09:41 20 And, Jason, could you advance one?

09:41 21 And has indicated that two of these indications of "the
09:41 22 input image" means something other than what we would consider
09:42 23 to be the clear antecedent basis, "an input image."

09:42 24 And so we would appreciate clarification from the Court as
09:42 25 to whether the plain and ordinary meaning of "the input image"

09:42 1 allows for that word to mean different things over the course
09:42 2 of the claim or, as we believe, whether it refers back
09:42 3 consistently to "an input image," the antecedent basis.

09:42 4 THE COURT: I'll hear a response from the plaintiff.

09:42 5 MR. MANGRUM: Your Honor, this is Brett Mangrum for the
09:42 6 plaintiff.

09:42 7 My father, who is a law professor who's never commented on
09:42 8 your court, he once taught when you strike oil, quit drilling.
09:42 9 And I think that's kind of where we are here.

09:42 10 But out of the sake of completeness, if you look at -- and
09:42 11 what I'm going to do is actually pull up the claim and then
09:42 12 share my screen. Do that real quick.

09:43 13 Okay. So what I've done here, I actually pulled this up
09:43 14 from the Google app, and I've highlighted "the input image."

09:43 15 Just to confirm, Your Honor, are you able to see the full
09:43 16 Claim 1 clearly so that I can address it? On your screen.

09:43 17 THE COURT: I get down to -- I see all the way down to
09:43 18 where it says "perform" -- let me see if I can move you folks.

09:43 19 I can now. Yes.

09:43 20 MR. MANGRUM: Okay. Good.

09:43 21 Okay. So our point here was that as you go through
09:44 22 Claim 1, you see at the outset -- and I'm at the -- sorry. I'm
09:44 23 at the first clause, the processing clause. The processing is
09:44 24 defined in terms of a correct -- performing a correction on the
09:44 25 input image.

09:44 1 Now, that's important because the correction on the input
09:44 2 image is later referenced as either being successful or
09:44 3 unsuccessful. So here -- let me give you an example.

09:44 4 In response to the processing of the input image being
09:44 5 unsuccessful. Now, keep in mind the processing must include a
09:44 6 correction on the input image.

09:44 7 So in certain clauses there are method steps performed on
09:44 8 the condition of the processing being unsuccessful. In other
09:44 9 clauses there's processing being conditioned in response to the
09:45 10 processing of the input image being successful.

09:45 11 So in the instances where it's successful, necessarily
09:45 12 there must have been a correction on the input image, right?
09:45 13 That's obviously not necessary in the case for unsuccessful.

09:45 14 What we heard today from Google's counsel was that -- a
09:45 15 concern that the input image is not necessarily the same in all
09:45 16 instances under the process flow set forth in Claim 1.

09:45 17 Well, that should not be a concern because there are
09:45 18 conditional statements that are mutually exclusive. In one
09:45 19 instance, something being in response to the input image being
09:45 20 unsuccessful; in another instance, something being responsive
09:45 21 to the processing of the input image being successful, which,
09:45 22 again, would necessarily require performing a correction on the
09:45 23 input image.

09:45 24 So in asking for the plain and ordinary meaning, we're not
09:46 25 departing from this antecedent reference of "the" inserted

09:46 1 before "input image." Rather, we are recognizing that the
09:46 2 claim language itself provides sufficient context.

09:46 3 And to suggest that "the input image" always refers to "an
09:46 4 input image" that had no correction performed thereon is just
09:46 5 simply inconsistent with the plain reading of the claim
09:46 6 language.

09:46 7 And to be clear, Your Honor, I think we've addressed all
09:46 8 of this in our briefing. I'm just attempting to summarize the
09:46 9 more salient points in view of what was argued today.

09:46 10 And with that, I'll stop sharing my screen.

09:46 11 THE COURT: Okay. Any response from Google?

09:46 12 MR. WARREN: So I timed that, Your Honor. That was just
09:46 13 over three and a half minutes to explain the plaintiff's
09:46 14 meaning of the term.

09:46 15 I don't know what it is, but it's not plain and ordinary.

09:47 16 Our understanding, which is plain and ordinary, is that
09:47 17 the word "an input image" sets -- you know, references an
09:47 18 image. That's the plain and ordinary meaning of the words
09:47 19 "and" and "image."

09:47 20 And, furthermore, using the normal rules of patent
09:47 21 construction, later references to "the input image" refer back
09:47 22 to the same image. I don't know how to summarize it more
09:47 23 quickly than that. I think that's pretty quickly. And I think
09:47 24 that plaintiff's sort of convoluted explanation of the
09:47 25 rationale for their understanding of the term explains why that

09:47 1 is not the plain and ordinary meaning.

09:47 2 THE COURT: Anything else from plaintiff?

09:47 3 MR. MANGRUM: No, Your Honor.

09:47 4 We have no ad hominem attack or any other explanation
09:47 5 other than what we've given or what's in our briefing.

09:47 6 THE COURT: I'll be back in a few seconds.

09:47 7 (Pause in proceedings.)

09:48 8 THE COURT: Okay. The Court does not believe that it
09:48 9 needs to give any additional construction to this. It will
09:48 10 maintain plain and ordinary meaning.

09:48 11 The next up we are moving -- let's see. We're moving to
09:49 12 "said processor configured to provide..." and it goes on. And
09:49 13 these are ones that my understanding is the plaintiff has asked
09:49 14 the Court to hear.

09:49 15 And so I'll start with plaintiff's counsel, whoever's
09:49 16 going to speak on behalf of plaintiff.

09:49 17 MR. MANGRUM: Your Honor, this is Brett --

09:49 18 THE COURT: Hannah tells me -- just told me I skipped
09:49 19 some, and I may have, given -- whoops. Did I skip -- I skipped
09:49 20 "computer program product." I apologize.

09:49 21 Let me do "computer program product," and then we have one
09:49 22 more for defendant, and then I'll turn to plaintiff. So I
09:49 23 apologize for that.

09:49 24 MR. WARREN: Thank you, Your Honor. And no problem.

09:49 25 The -- there are two terms left, Claim 25 of the '491

09:49 1 patent and Claim 13 of the '491 patent. For these terms, there
09:49 2 are two issues: One, whether or not means-plus-function
09:50 3 treatment applies and then, two, the Court's determination
09:50 4 regarding the function and structure.

09:50 5 We are arguing at this point only the first issue. And so
09:50 6 we are not arguing at this point the Court's function and
09:50 7 structure determinations.

09:50 8 I would like to speak on whether or not these terms should
09:50 9 receive means-plus-function treatment. And I'd like to start,
09:50 10 if that's okay with Your Honor, with Claim 25, "apparatus
09:50 11 comprising a processor and memory including computer program
09:50 12 code."

09:50 13 And if that's all right, Jason, can you put up their
09:50 14 Slide 6 regarding disputed processor terms?

09:50 15 This is a slide that we received this morning. It's
09:50 16 regarding a different patent. It's regarding a different
09:50 17 patent, and I'm sure they'll talk about it when we get to that
09:50 18 patent.

09:50 19 But they set forth three factors used in determining
09:51 20 whether processor itself connotes sufficient structure and is
09:51 21 not a nonce term.

09:51 22 I don't totally agree with their standard, but for the
09:51 23 purposes of this argument, we can accept their standard because
09:51 24 I think we win even under their standard.

09:51 25 The first thing that they say is whether a party seeking

09:51 1 means-plus-function construction has pointed to a record that
09:51 2 establishes that processors is generic. We have done that.

09:51 3 If you look at Column 9 of the '491 patent, starting at
09:51 4 Line 31, it says, "For example, the processing element 72 may
09:51 5 be embodied as a processor, a coprocessor, a controller or
09:51 6 various other processing means or devices, including integrated
09:51 7 circuits such as, for example, an ASIC."

09:51 8 I don't know how to be more generic than that. They
09:51 9 essentially say the processor can be anything.

09:51 10 Point No. 2 is whether the claims in the specification
09:52 11 provide specific connection and interaction of the claim
09:52 12 processor with other structural components. Again, they do
09:52 13 not. There is simply a box that says: This box is a
09:52 14 processor.

09:52 15 And then, Jason, if you could turn to the next slide.

09:52 16 Category 3, whether the claims and specification describe
09:52 17 how the data processor accomplishes the claimed functions.
09:52 18 Again, they do not. And the plaintiff has not explained how
09:52 19 they do.

09:52 20 So for this reason -- and then I will now cite to the
09:52 21 highest and best authority, which is Your Honor's ruling
09:52 22 elsewhere in this case on Claim 1 of the '825 patent, which is
09:52 23 not being contested further by the plaintiff, at least at this
09:52 24 hearing, which has strikingly similar language.

09:52 25 Claim 1 of the '825 patent is "at least one memory and the

09:52 1 computer program code are configured, with the at least one
09:53 2 processor to cause the apparatus to at least..."

09:53 3 That is almost exactly the same as the language in
09:53 4 Claim 25 of the '491 patent, which simply says "apparatus
09:53 5 comprising a processor and memory including computer program
09:53 6 code, the memory and the computer program code configured to,
09:53 7 with the processor, cause the apparatus at least to..."

09:53 8 We believe that Your Honor's tentative was correct with
09:53 9 regard to Claim 1 of the '825. And in light of the standard
09:53 10 set forth by the plaintiff and its application to Claim 25 of
09:53 11 the '491, we believe that Claim 25 of the '491 should also
09:53 12 receive means-plus-function status, which would mean that since
09:53 13 we are not contesting those at this time, Your Honor's
09:53 14 tentative function and structure with regard to Claim 41 would
09:53 15 apply to Claim 25 as well.

09:53 16 Thank you.

09:53 17 THE COURT: Thank you, sir.

09:54 18 A response?

09:54 19 MR. MANGRUM: Yes. If I could have the screen back.

09:54 20 Thank you.

09:54 21 This is Brett Mangrum speaking on behalf of plaintiff.

09:54 22 So a couple of points. One, it's interesting they cite to
09:54 23 authority we address in our briefs concerning instances where
09:54 24 terms recite means. Here that's not the case.

09:54 25 So as Your Honor is aware, one of the points we raised in

09:54 1 our briefing that's very important here is that Claim 25 is an
09:54 2 apparatus claim that has -- the body of Claim 25 is very
09:54 3 similar in limitations to the body of Claim 41. Really the
09:54 4 only meaningful difference is that Claim 41 is written in
09:54 5 means-plus-function form. Both are directed to an apparatus.

09:54 6 So if you come to a conclusion that Claim 25 invokes
09:55 7 means-plus-function and the parties have agreed that Claim 41
09:55 8 does so, what you have is two independent claims that have
09:55 9 literally no difference in scope.

09:55 10 And that gives rise to a presumption, and it's a strong
09:55 11 presumption in this instance, under the Doctrine of Claim
09:55 12 Differentiation that when the patentee used "means for" for one
09:55 13 independent claim in reciting certain limitations and did not
09:55 14 use "means for" in another apparatus claim in reciting
09:55 15 virtually identical limitations, that the distinction was
09:55 16 intentional.

09:55 17 And under the Doctrine of Claim Differentiation, those
09:55 18 terms must be given -- or sorry -- those independent claims
09:55 19 must be given different scope and meaning.

09:55 20 That was our primary argument. We cited to Al-Site for
09:56 21 that proposition. That's a Federal Circuit case. And we
09:56 22 believe that it's -- as an extension of the Doctrine of Claim
09:56 23 Differentiation, that's important.

09:56 24 There's also a secondary presumption that we have to
09:56 25 overcome that, again, wasn't part of those cases that they

09:56 1 cited from our slide deck, which is that the lack of the words
09:56 2 "means" in Claims 13 and 25 gives rise to a rebuttable
09:56 3 presumption that the terms don't invoke means-plus-function.

09:56 4 In the absence of Claim 41, this might have been a closer
09:56 5 call. But Claim 41 really is the nail in the coffin for their
09:56 6 construction because it leaves no doubt that if you want to
09:56 7 have Claim 25 and Claim 41 have difference in meaning and
09:56 8 scope, you must conclude that Claim 25, the apparatus claim,
09:56 9 does not invoke means-plus-function construction when Claim 41
09:57 10 does.

09:57 11 And this is further compounded by Claim 13, which also in
09:57 12 its body has limitations that match up line for line almost
09:57 13 with Claims 25 and 41.

09:57 14 The difference between Claims 13 and 25 is that, one,
09:57 15 Claim 13 is directed to a computer program product and then
09:57 16 the -- which is, as we explained in our briefing, more of the
09:57 17 Beauregard form of claim drafting, whereas Claim 25 is directed
09:57 18 to an apparatus.

09:57 19 But beyond that, the limitations are largely identical.
09:57 20 So, again, we submit the presumptions that weren't even
09:57 21 referenced in opposing counsel remarks and were hardly rebutted
09:57 22 in the briefing, those presumptions are significant here, and
09:57 23 they stand unrebutted.

09:57 24 THE COURT: A response?

09:57 25 MR. WARREN: Sure, Your Honor.

09:57 1 I'm a little puzzled by counsel's argument, which
09:58 2 primarily said that the slides that we put up about the
09:58 3 disputed processor terms concerned a term where the word
09:58 4 "means" appears. That's simply not correct.

09:58 5 If you look at Page 9 of the Court's claim construction,
09:58 6 tentative, or it's Page 9 of mine, I'm not sure if it's the
09:58 7 same. That term is "said processor configured to provide," and
09:58 8 there's a dispute there about whether or not that's subject to
09:58 9 means-plus-function. The word "means" does not appear there at
09:58 10 all. So we are -- we're in the same place in terms of the
09:58 11 presumption in that case -- or on that term as we are here.

09:58 12 Counsel also made an argument regarding claim
09:58 13 differentiation. The Al-Site case, if you look at their brief
09:58 14 on Page 7 of their reply brief, they actually don't cite the
09:58 15 Al-Site brief for this. They cite the Matthews Patent Digest
09:58 16 interpretation of the Al-Site case.

09:58 17 I don't agree with that interpretation. I don't think
09:58 18 it's correct. But it doesn't matter because I have much higher
09:59 19 authority, which is Your Honor's findings again, elsewhere in
09:59 20 these very cases again, uncontested by plaintiff during this
09:59 21 hearing, specifically with regard to Claim 16 of the '563
09:59 22 patent, and that is in the 581 case.

09:59 23 And in that case Your Honor found that an alerting unit
09:59 24 configured to issue an alert was subject to 112(6) despite the
09:59 25 fact that there was an equivalent "means for" claim.

09:59 1 And I agree with Your Honor that claim differentiation
09:59 2 does not require a "means for" claim to eliminate
09:59 3 means-plus-function treatment. They are subject to the --
09:59 4 other claims are subject to the regular Williamson analysis,
09:59 5 and there is obviously a different presumption. And we
09:59 6 acknowledge that, and we believe we've overcome that.

09:59 7 But the existence of one claim that says "means for" is
10:00 8 not a "get out of means-plus-function treatment free card" for
10:00 9 every other claim in the same patent. There's no case that
10:00 10 says that it is. It wouldn't make sense that it is. Even the
10:00 11 Al-Site case that they quote applied the regular Williamson
10:00 12 analysis, which is required by the Federal Circuit.

10:00 13 We think we win under that analysis, and we think the
10:00 14 Court properly applied that in the 581 case despite the
10:00 15 existence of a "means for" claim elsewhere in the same patent.

10:00 16 Thank you, Your Honor.

10:00 17 THE COURT: Anything else from plaintiff?

10:00 18 MR. MANGRUM: Yeah. Just the final point would be, one
10:00 19 thing we didn't address today, but it's clear in our briefing,
10:00 20 is that the structure of -- and a difference in what's recited
10:00 21 in Claim 25 and Claim 24 arises in part from the preamble
10:00 22 itself.

10:00 23 And we pointed to authority where in reciting Beauregard
10:01 24 forms of claim drafting, the computable readable storage medium
10:01 25 having computer readable program code portions stored therein,

10:01 1 that form of claim drafting has been recognized by the courts
10:01 2 consistently as referring to sufficiently definite structure,
10:01 3 and then the body of the claim then goes to operations that the
10:01 4 software performs.

10:01 5 To suggest that that form of claim drafting invokes
10:01 6 means-plus-function construction, that's against the Beauregard
10:01 7 claim drafting practice that's been recognized for quite some
10:01 8 time now.

10:01 9 And, again, for 5 -- Claim 5, I think it's important --
10:01 10 and you haven't heard any argument today or in Google's
10:01 11 briefing -- that Claims 5 and 40 -- sorry. I said Claim 5. I
10:01 12 meant Claim 25.

10:01 13 Claim 25 and 41 are both directed to an apparatus. You
10:02 14 haven't heard any distinction from opposing counsel today as to
10:02 15 meaning and scope if the Court were to interpret Claim 25 and
10:02 16 Claim 41 as both being means-plus-function construction. They
10:02 17 haven't disputed the fact that that would then render Claim 25
10:02 18 completely superfluous with Claim 41.

10:02 19 And that's why, again, that -- the presumption here is not
10:02 20 just a presumption. It's an especially strong presumption when
10:02 21 you would subsume one claim into another.

10:02 22 And we submit that because of that, because of the
10:02 23 circumstances unique to this case, and because of the -- the
10:02 24 lack of the word "means" creates a separate presumption, that
10:02 25 these presumptions applicable here -- and not always applicable

10:02 1 in the authority that we cited to because in certain instances
10:02 2 the terms at issue were "means for" terms, that in view of
10:02 3 that, the -- these applicable presumptions have now been
10:02 4 rebutted and the preliminary construction should stand.

10:03 5 THE COURT: Anything else for Google?

10:03 6 MR. WARREN: Only if Your Honor has questions.

10:03 7 THE COURT: Okay. Thank you. I'll be back in a few
10:03 8 seconds.

10:03 9 (Pause in proceedings.)

10:06 10 THE COURT: If we can go back on the record.

10:06 11 The Court is going to maintain its plain and ordinary
10:06 12 meaning construction.

10:06 13 And the last term to be taken up by Google, I think, is
10:06 14 "apparatus comprising a processor and memory..." and goes on
10:06 15 from there.

10:06 16 Counsel?

10:06 17 MR. WARREN: Your Honor, that was the one -- Claim 25 was
10:06 18 the one that we just argued.

10:06 19 THE COURT: Okay. Good.

10:06 20 MR. WARREN: In light of Your Honor's decision, I will
10:06 21 reserve on Claim 13, "computer program product comprising."

10:06 22 THE COURT: Okay. Thank you. Then we'll move to the
10:06 23 plaintiff's terms.

10:06 24 MR. MANGRUM: Your Honor, this is Brett Mangrum. And I'll
10:06 25 be presenting for the remainder of plaintiff's terms.

10:07 1 We submitted slides this morning pursuant to the Court's
10:07 2 instructions, both to the court reporter and to opposing
10:07 3 counsel. I want to make certain that you can see that now as
10:07 4 the portion of the screen that I'm sharing.

10:07 5 THE COURT: I can.

10:07 6 MR. MANGRUM: Okay. Great.

10:07 7 So, again, this is Brett Mangrum for plaintiff speaking,
10:07 8 and I'm now looking at Slide 1. I'm going to expand this to
10:07 9 make certain that the slide numbering can be shown.

10:07 10 And for these terms here we are dealing with a situation
10:07 11 where there were not "means for" terms recited in either the
10:08 12 '045 patent or the '585 patent.

10:08 13 So what I'm showing on Slide 2 is the claim language in
10:08 14 question in two separate patents of two separate cases. I will
10:08 15 first address Claim 1 of the '045 patent, which is asserted in
10:08 16 the 574 case. I will then address Claim 9 of the '585 patent
10:08 17 in the 577 case.

10:08 18 And to be clear, one thing that distinguishes these, and
10:08 19 we concede this and recognize this, is that in these cases they
10:08 20 were not separate "means for" claims that had the exact same --
10:08 21 otherwise had the exact same scope. So that especially strong
10:08 22 presumption that I referenced earlier does not apply here.

10:08 23 And for that reason, in addressing these particular terms,
10:08 24 we cited to Optis -- actually, I think it was in response to
10:08 25 the defendant citing to Optis, but we refer to those same cases

10:09 1 as providing a helpful analysis to determine whether or not
10:09 2 "processor configured to" in particular, that particular phrase
10:09 3 invokes 112(6) or not.

10:09 4 And the slides that opposing counsel showed went to a
10:09 5 discussion of what -- what do you look at in the intrinsic
10:09 6 evidence that would be helpful in understanding whether or not
10:09 7 processor is just a black box with no real meaning, just an
10:09 8 ethereal element, or instead, whether a processor is, as that
10:09 9 term is typically used in the art and connotes definite
10:09 10 structure. And the courts look at how that term is used in the
10:09 11 intrinsic evidence to make that decision.

10:09 12 And so if I could just touch again on the two points
10:09 13 that -- I was going to skip this, but since they brought it up,
10:10 14 I want to make sure that it's clear.

10:10 15 So in the Optis case one of the factors that the Court
10:10 16 considered was whether or not the party seeking a
10:10 17 means-plus-function construction, in this case the defendant,
10:10 18 has "pointed to an intrinsic record that establishes that
10:10 19 'processors' is meant here to generically be anything that
10:10 20 manipulates data as opposed to connoting structure representing
10:10 21 what is generally known as a processor."

10:10 22 There was a second important point that's also relevant
10:10 23 here raised in Optis, and that was whether -- and I'm quoting
10:10 24 again -- "the claims and specification provide specific
10:10 25 connection and interaction of the claim processor" -- and that

10:10 1 is in brackets -- "with other structural components."

10:10 2 There was a third point that was relevant in another case
10:11 3 that I believe, again -- well, we certainly cited to it, but I
10:11 4 think it was in response to defendants citing to this case, an
10:11 5 Eastern District of Texas case, St. Isidore Research.

10:11 6 And the quote there is whether "the claims and
10:11 7 specification describe how the data processor accomplishes the
10:11 8 claimed functions."

10:11 9 Now, in view of this instruction we felt was helpful, we
10:11 10 looked then in our briefing at the intrinsic evidence and
10:11 11 showed instances where the intrinsic evidence supported an
10:11 12 understanding that here in this particular -- so I'm referring
10:11 13 to the first case, Claim 1 of the '045 patent, 574 case, said
10:11 14 "processor configured to provide a preemptive user output when
10:11 15 the subset of pixels approaches an edge of the set of available
10:11 16 pixels."

10:11 17 We endeavored to show in our briefing instances where the
10:12 18 intrinsic evidence matches up with those types of factors that
10:12 19 would support an understanding consistent with the lack of the
10:12 20 word "means" that processor connotes sufficiently definite
10:12 21 structure to avoid application of Paragraph -- of Section
10:12 22 112(6).

10:12 23 Now, here are -- here's where the river meets the road.
10:12 24 Here's intrinsic evidence with reference to Processor 4.

10:12 25 That is the element that we identified in the event that

10:12 1 the Court says that this term invokes 112(6), that is the
10:12 2 structure.

10:12 3 But what does the specification say about the processor?

10:12 4 And keep in mind, the word "processor" itself is recited in the
10:12 5 claim as corresponding structure.

10:12 6 So this Figure 15A of Slide 8 and a corresponding example
10:12 7 description of Figure 15A are particularly important. Now,
10:12 8 what we see in Figure 15A is a Box 80 of processing circuitry
10:13 9 and Box 82 of memory, both of those being indicated by these --
10:13 10 general reference 4 which is Processor 4.

10:13 11 And this is what the corresponding description states.

10:13 12 Referring to Figure 15A, "The Processor 4 may comprise
10:13 13 processing circuitry 80 that is configured to read from and
10:13 14 write to a memory 82. The processing circuitry 80 may also
10:13 15 comprise an output interface via which data and/or commands are
10:13 16 output by the Processor 4 and an input interface via which data
10:13 17 and/or commands are input to the Processor 4."

10:13 18 So I'm reading here from Columns 13, Lines 16 to 21 of the
10:13 19 '045 patent.

10:13 20 So what we see here is that very explicit description of
10:13 21 the processor connoting sufficiently physical structure having
10:14 22 certain operations that are generally associated with a
10:14 23 physical processor as is known in the art.

10:14 24 Now, in response to pointing to this disclosure, all we
10:14 25 have from the defendant's side is attorney argument that that's

10:14 1 not enough. Or that this disclosure would not be understood by
10:14 2 persons of ordinary skill in the art to describe "processor" as
10:14 3 that "processor" term is normally understood as a term that
10:14 4 connotes structure.

10:14 5 We don't have expert testimony from their side giving the
10:14 6 perspective of a POSITA or a person of ordinary skill in the
10:14 7 art as to how they would interpret this particular disclosure
10:14 8 referring to processing circuitry and memory and interaction
10:14 9 between those two all being encompassed within a processor.

10:14 10 But the specification goes on. And after describing --
10:14 11 I'm sorry. Even in earlier figures it discusses the Processor
10:15 12 4 in terms of its interoperation, interconnection with other
10:15 13 elements, physical components of the system.

10:15 14 So on Slide 9 what we've shown is on the left the '045
10:15 15 patent, Figure 1 with the processor in communication with the
10:15 16 camera sensor 10.

10:15 17 And then on Figure 3 you have a Processor 4, which here is
10:15 18 described as host processor in connection with a memory 26,
10:15 19 user input/output 6, and then also a camera sensor.

10:15 20 Now, there's a dotted line around the camera sensor here
10:15 21 because the corresponding description in the specification
10:15 22 refers to the camera sensor is being housed within a hardware
10:15 23 module 20.

10:15 24 So here you have the host Processor 4 showing an
10:15 25 interconnection with hardware, right? A hardware module that's

10:15 1 housing a camera sensor. Again, underscoring that from the
10:16 2 perspective of the patent, the word "processor" is used as it's
10:16 3 known in the art to connote sufficiently definite structure,
10:16 4 and it's a physical component.

10:16 5 We also pointed in our briefing to what I've shown here in
10:16 6 exploded form on Slide 10 from Columns 5 and 6, that the host
10:16 7 processor 24 and 28 may be a multifunctional processor such as,
10:16 8 for example, a central processing unit.

10:16 9 And then moving to Slide 11, this slide's important
10:16 10 because it identifies two aspects of the processor that are
10:16 11 significant in view of the claim language that's in dispute.

10:16 12 Now, Claim 1 recites the processor term in multiple
10:16 13 contexts. In order to comply with the Court's order to narrow
10:16 14 the disputes, the defendant chose to pick this particular said
10:16 15 processor limitation.

10:16 16 We don't take issue with that. I'm just bringing that up
10:17 17 to the Court that there are other instances where said
10:17 18 processor is recited. This is the one they chose to address.

10:17 19 And in this particular instance, the functional language
10:17 20 they identified is described and attributed within the
10:17 21 specification to Processor 4, which is why we argued in the
10:17 22 alternative in the event the processor term as recited invokes
10:17 23 Paragraph 112(6) that the corresponding structure, as set forth
10:17 24 in the specification, would be Processor 4.

10:17 25 So what we've shown here on Slide 11 is a Figure 14 -- and

10:17 1 actually it's just a portion of Figure 14 -- that has two
10:17 2 operational steps, 120 and 122.

10:17 3 One, in the 120 is "detect subset of pixels approaching
10:17 4 edge of set of pixels." And then in 122, "output preemptive
10:17 5 user output."

10:17 6 Now, in the corresponding description, both of these are
10:17 7 attributed to the processor, the same physical element that was
10:18 8 addressed in earlier slides and in our briefing.

10:18 9 So reading from Column 12, Lines 42 to 48, "then at block
10:18 10 120 the Processor 4 detects that the subset of pixels, 102, is
10:18 11 approaching an edge of the set of available pixels. Next, at
10:18 12 block 122, the Processor 4 provides a preemptive user output
10:18 13 110."

10:18 14 And then it goes on to describe output 110.

10:18 15 Now, this is not all that the specification provides. But
10:18 16 this is important because here there's an explicit tether in
10:18 17 the description between what the defendant has identified as
10:18 18 functional language for this term and Processor 4.

10:18 19 When you go on, there is -- there are other figures beyond
10:18 20 just the flowchart that describes the process of detecting and
10:18 21 outputting.

10:18 22 So here on Slide 12 you have excerpt from Column 10, Lines
10:19 23 17 to 25 where it talks about, "As this tracking process
10:19 24 continues, the subset of pixels approaches an edge 103 of the
10:19 25 set of available pixels. This is illustrated in Figs. 8B, 9B

10:19 1 and 9C." For the convenience of the Court, Figure 9B is also
10:19 2 shown on Slide 12.

10:19 3 The description goes on to say at Line 20 of Column 10,
10:19 4 "The Processor 4 is configured to detect when the subset of
10:19 5 pixels 102 approaches an edge (example, edge 103) of the set of
10:19 6 available pixels. The Processor 4 is configured to provide, in
10:19 7 response to that detection, a preemptive user output that
10:19 8 facilitates or instigates user action."

10:19 9 Okay. Now, but that's not it. That's not all it's
10:19 10 providing.

10:19 11 So we clearly have a tethering within the specification of
10:20 12 Processor 4 to the functional description. We clearly have
10:20 13 descriptions within the specification of the physical nature of
10:20 14 processor.

10:20 15 But in addition to all of that, in connection with the
10:20 16 dual-step process of detecting a subset of pixels and
10:20 17 outputting a preemptive user output, the specification goes on
10:20 18 to provide examples of how that is accomplished for both of
10:20 19 those steps.

10:20 20 And so what is shown in Slide 18 is an excerpt from Column
10:20 21 11, Lines 8 through 26, and I won't read it all into the
10:20 22 record, but the highlighted part is important.

10:20 23 Starting at Line 8 of Column 11, the specification states,
10:20 24 "The Processor 4 may be configured to detect the subset of
10:20 25 pixels 102 approaching an edge of the set of available pixels

10:20 1 100 in a number of different ways. For example..." And the
10:20 2 disclosure that continues provides an example of how this is
10:20 3 done for the detection.

10:21 4 But the specification doesn't stop there. As shown in
10:21 5 Slide 14, there's a further description of the output and it
10:21 6 provides an example. Slide 13 -- I'm sorry -- Slide 14
10:21 7 includes a screenshot of Figure 13 from the '045 patent. And
10:21 8 on the left it includes an excerpt of Column 11, 27 to 42 of
10:21 9 the '045 patent.

10:21 10 And here, this is important because you have a description
10:21 11 of how user output 110 may be preemptively provided according
10:21 12 to an example embodiment. And if I would just for the sake of
10:21 13 completeness read into the record the first statement appearing
10:21 14 on Line 27. "In Figure 8B a particular type of user output,
10:21 15 110, is provided preemptively to avoid loss of tracking when
10:21 16 the subset of pixels, 102, approaches an edge of the set of
10:21 17 available pixels, 100."

10:21 18 And then it says, "However, other forms of preemptive user
10:21 19 output, 110, may be provided." Then it goes on to provide an
10:22 20 example of how this is accomplished with reference to Figure
10:22 21 13.

10:22 22 And so keeping in mind that these terms do not recite the
10:22 23 word "means," the processor configured to terms of the '045
10:22 24 patent that's recited in Claim 1 only. They don't recite the
10:22 25 word "means." So there's a presumption that we worked with at

10:22 1 the outset that the terms don't invoke means-plus-function.

10:22 2 We have to also keep in mind who has the burden of proof
10:22 3 here to show indefiniteness and that the burden of proof is by
10:22 4 clear and convincing evidence.

10:22 5 The theory advanced by defendant in this case for this
10:22 6 claim was that the specification discloses no corresponding
10:22 7 structure.

10:22 8 And keep in mind it's their burden to prove that that is
10:22 9 true by clear and convincing evidence. The burden doesn't
10:22 10 shift at any point for this particular term in this discussion
10:22 11 to plaintiff.

10:22 12 Nevertheless, in the interest of showing that there are --
10:22 13 that Processor 4 does connote structure, that there's a
10:23 14 description, and that there's a description associated with the
10:23 15 functional language. We identified in our brief where that is.
10:23 16 We've summarized it here.

10:23 17 We submit that in view of what the intrinsic evidence
10:23 18 shows, the very onerous burden of clear and convincing evidence
10:23 19 that there's no structure -- that's their theory -- is simply
10:23 20 not met.

10:23 21 I also want to emphasize that in the briefing that Google
10:23 22 provided there was no argument that algorithmic structure was
10:23 23 necessarily required. There's no mention of Aristocrat or WMS
10:23 24 Gaming. Nevertheless, there are algorithmic disclosure and
10:23 25 flowcharts shown, and we've emphasized that here.

10:23 1 But that was never an argument that they raised. Their
10:23 2 argument -- in fact, they worded in the alternative. In their
10:23 3 opening brief -- I'm sorry -- their responsive brief to
10:23 4 plaintiff's opening brief, defendants said something to the
10:23 5 effect of "there's no algorithm or structure and that's why
10:24 6 it's indefinite."

10:24 7 And so they appear to concede there that either one of
10:24 8 those would have been sufficient. We submit that there's both,
10:24 9 but they never made the argument that there necessarily needs
10:24 10 to be an algorithm.

10:24 11 Had they done so, it still would have fallen flat because
10:24 12 as shown, there is an algorithm that involves, at a minimum,
10:24 13 detecting when you approach an edge and then, based off that
10:24 14 detection, an output. And that there are explicit attributions
10:24 15 of that functional requirement for those operations, I should
10:24 16 say, as disclosed in the specification to the Processor 4.

10:24 17 And then, again, Processor 4 itself is described as having
10:24 18 corresponding electric circuitry on this having -- interfacing
10:24 19 with other structural components of the system. And it's
10:24 20 recited in the context of the claims as interconnected and
10:24 21 interoperating with other components.

10:24 22 So in view of the case law that says, here's some factors
10:24 23 to consider when you're looking at "process configured to"
10:25 24 language to assess whether or not the term invokes
10:25 25 means-plus-function construction.

10:25 1 And keeping in mind for both presumptions, both for
10:25 2 raising an indefiniteness argument, it's clear and convincing
10:25 3 evidence, burden of proof. And to rebut the presumption, it's
10:25 4 not the same burden. We recognize that, but it's still a
10:25 5 burden for petitioner to rebut that -- we feel that they
10:25 6 haven't been rebutted here. We feel that the perspective of a
10:25 7 person of ordinary skill in the art has not been established by
10:25 8 expert testimony for certain, and then all we have is an
10:25 9 argument from defendant that in view of all this evidence,
10:25 10 there is no structure.

10:25 11 And we simply submit that that's not a plausible
10:25 12 interpretation of the intrinsic evidence before the Court.

10:25 13 THE COURT: A response from Google?

10:25 14 MR. LANIER: Yes, Your Honor. My colleague, Marlee
10:26 15 Hartenstein, will respond with respect to the '045 patent on
10:26 16 this issue.

10:26 17 MS. HARTENSTEIN: Thank you, Your Honor. This is Marlee
10:26 18 Hartenstein for Google.

10:26 19 Your Honor, we accept the Court's --

10:26 20 THE COURT: Welcome to my Court. I look forward to
10:26 21 hearing you.

10:26 22 MS. HARTENSTEIN: Thank you very much.

10:26 23 Your Honor, we accept the Court's tentative construction
10:26 24 of this processor term. The arguments that plaintiff just
10:26 25 presented today have all been addressed in our briefing and

10:26 1 were properly accounted for in Your Honor's tentative.

10:26 2 Unless Your Honor has any specific questions, I do just
10:26 3 have a quick couple of responsive points.

10:27 4 First, Your Honor, we heard a lot of argument about the
10:27 5 presumption against the client, Section 112(6), but the
10:27 6 presumption is just that.

10:27 7 And, Jason, if you could briefly put up Slide 18 for the
10:27 8 '045 patent. Thank you.

10:27 9 Cases tell us, and we've explained in our brief, that the
10:27 10 presumption is not strong. And in situations such as this
10:27 11 where a processor is defined by purely functional terms, you
10:27 12 can't avoid Section 112(6).

10:27 13 And, further, with respect to their contention that expert
10:27 14 testimony is required, the Federal Circuit has told us, and we
10:27 15 have said in our briefs, that that's not the case. Expert
10:27 16 testimony is not necessary. In fact, the Federal Circuit has
10:27 17 said that the intrinsic evidence is the most important.

10:27 18 And, lastly, Your Honor, with respect to their arguments
10:27 19 regarding corresponding structure, plaintiff has a few
10:27 20 problems.

10:27 21 As a threshold matter, this indefiniteness issue has been
10:28 22 front and center since January, but this is the first time that
10:28 23 they've attempted to identify any corresponding structure. So
10:28 24 at a minimum, this issue is waived. But even if not, their
10:28 25 argument still substantively fails.

10:28 1 This is a computer-implemented invention, Your Honor. And
10:28 2 in that case, cases like Williamson has told us that simply
10:28 3 pointing to a general purpose computer or processor is not
10:28 4 enough.

10:28 5 What is necessary, what is absent here and what they still
10:28 6 haven't identified is an algorithm that performs the recited
10:28 7 function.

10:28 8 At most they show from the specification a simple
10:28 9 repetition of the functional language of the claim. We can see
10:28 10 that perfectly on plaintiff's Slide 11. Really, processor is
10:28 11 used as a placeholder here to describe a few functional
10:28 12 limitations of this claim.

10:28 13 And unless Your Honor has any other specific questions, we
10:28 14 accept the Court's tentative, and I'm happy to conclude and
10:28 15 pass the baton on to the next term.

10:28 16 THE COURT: Okay. I'll be back in a second.

10:29 17 (Pause in proceedings.)

10:29 18 MR. MANGRUM: Your Honor, if I may address one important
10:29 19 point to correct the record?

10:29 20 THE COURT: Sure.

10:29 21 MR. MANGRUM: So to be very clear, we are not -- I agree
10:29 22 with what Ms. Hartenstein said at the outset, which is that we
10:29 23 have summarized here the points we raised in our briefing.
10:29 24 That's correct. That's what we've presented today.

10:29 25 It's not correct, however, to suggest that we never stated

10:29 1 Processor 4 is the corresponding structure. That's in our
10:29 2 brief. And, in fact, it's reflected in the Court's
10:29 3 articulation of the parties' respective positions.

10:29 4 So that's something that we've all argued in our briefing.
10:29 5 The Court's recognized that's from our briefing. We've argued
10:29 6 that in the alternative to an interpretation that this term
10:29 7 does not invoke 112(6).

10:29 8 So to suggest that's being sprung here for the first time
10:29 9 is a mischaracterization of the record. However, one point I
10:30 10 want to make clear is when you look at their briefing, and I'm
10:30 11 happy to go to the --

10:30 12 THE COURT: Let me interrupt you. So --

10:30 13 MR. MANGRUM: Yeah.

10:30 14 THE COURT: And so I have to say that it's always good to
10:30 15 wake up in the morning and face someone with such passion over
10:30 16 a means -- a means-plus-function structure. It's rare you get
10:30 17 this much excitement.

10:30 18 Help me with whether the Processor 4 is adequate
10:30 19 disclosure of a structure. Does that make sense?

10:30 20 MR. MANGRUM: Yeah. Sorry. Was that a question? It
10:30 21 didn't come through.

10:30 22 THE COURT: Yes, sir. That was a question.

10:30 23 That was our debate as we were trying to figure out
10:30 24 whether the -- obviously, the preliminary construction was
10:30 25 whether it was -- there was an adequate disclosure of a

10:30 1 specific processor. And help me with Figure 4 -- I'm sorry --
10:31 2 Processor 4 being an adequate structure in this case.

10:31 3 MR. MANGRUM: Sure. So that -- I think I understand your
10:31 4 question now.

10:31 5 And Processor 4, to be clear, we didn't just say processor
10:31 6 in general. We were specific in identifying Processor 4 and
10:31 7 the corresponding description of Processor 4, and that's
10:31 8 important.

10:31 9 What we didn't do, but we'd be willing to do now if this
10:31 10 is -- if this is defendant's new argument, is to further
10:31 11 specify, as we argued from Slide 11 of our demonstratives, that
10:31 12 the Processor 4 would -- which is itself structure -- would
10:31 13 effectuate this functional language by executing Steps 120 and
10:32 14 122 of Figure 14.

10:32 15 Now, there's a reason why we didn't do that in our
10:32 16 briefing. And the reason is we really kind of had to shoot in
10:32 17 the dark in our opening claim construction brief because we
10:32 18 hadn't had any specifics from Google as to their theory of
10:32 19 indefiniteness. They didn't tell us whether or not they felt
10:32 20 the term necessarily required disclosure of an algorithm.

10:32 21 In their opening -- sorry -- in their response to our
10:32 22 opening brief, they still did not say this. They didn't cite
10:32 23 Aristocrat. They didn't cite WMS Gaming, and they never made
10:32 24 the argument "this term must disclose an algorithm or it is
10:32 25 indefinite."

10:32 1 And because they never raised that argument, we figured
10:32 2 the dispute was more accurately characterized as to whether or
10:32 3 not Processor 4 provides sufficiently definite structure.

10:32 4 For the first time today, we've now heard from them that
10:33 5 there must be a disclosure of an algorithm. If that's their
10:33 6 position, then that doesn't support an indefiniteness argument.
10:33 7 One simply needs to look to where in the specification there's
10:33 8 a disclosure of algorithmic structure corresponding to the
10:33 9 functional language at issue.

10:33 10 And we submit there is. It's what the Processor 4 does,
10:33 11 and it's expressly tethered in a two-step process to what is
10:33 12 required in the claim language in dispute. And, again, it's
10:33 13 Processor 4 that does it.

10:33 14 So a Processor 4 operating Steps 120 and 122 of Figure 14
10:33 15 would be the structure. This has been analogous structure
10:33 16 that's been identified in other cases where a processor has
10:33 17 been found to invoke 112(6).

10:33 18 And to suggest there's no algorithm, there's no structure,
10:34 19 that, we feel, is inconsistent with the intrinsic evidence and
10:34 20 not supported by anything other than a blind eye in briefing to
10:34 21 what is actually disclosed.

10:34 22 THE COURT: Any response?

10:34 23 MS. HARTENSTEIN: Yes, Your Honor.

10:34 24 The algorithm that the plaintiffs point to is that
10:34 25 flowchart on -- I believe it's Figure 14, but really all that

10:34 1 does is simply repeat the claim language. That doesn't
10:34 2 disclose an algorithm.

10:34 3 If we look at the term "processor," it's really just a
10:34 4 catch-all that -- without noting sufficiently detailed
10:34 5 structure. But even if processor did connote some level of
10:34 6 structure in and of itself, as we've explained in our brief,
10:34 7 that's not enough.

10:34 8 The Federal Circuit has told us that the question is not
10:34 9 if it connotes some level of structure. It's whether they have
10:34 10 sufficient structure to perform the claim function.

10:35 11 THE COURT: Response to that?

10:35 12 MR. MANGRUM: Yeah. I just -- I don't think that they're
10:35 13 articulating the correct standard, Your Honor. I think the
10:35 14 processor is described as being physical. It's described, as
10:35 15 we showed in Slide 8, as containing processing circuitry, and
10:35 16 on its own it incorporates some form of memory. It's described
10:35 17 as being structurally interconnected with other components that
10:35 18 you didn't hear today or in Google's briefing that are somehow
10:35 19 ethereal.

10:35 20 There's been no dispute that the processor is described in
10:35 21 the spec as being connected to physical structure. This is
10:35 22 also relevant to the analysis and factors courts have
10:35 23 considered. That's not in dispute, right?

10:35 24 There hasn't been a dispute of how the claim language
10:35 25 itself interconnects, interoperates the processor with other

10:35 1 recited components.

10:35 2 So they haven't explained why in view of Figure 1,
10:35 3 Figure 3 and Figure 15A, that somehow the Processor 4 is
10:36 4 ethereal or a black box and has no corresponding description
10:36 5 where a person from ordinary skill in the art in view of what's
10:36 6 disclosed would recognize, oh, when they say "processor,"
10:36 7 that's what they mean. They mean processor.

10:36 8 We pointed to evidence. We pointed to what the
10:36 9 specification discloses. There's been no rebuttal to the
10:36 10 evidence we pointed to other than to say, we don't think it's
10:36 11 enough.

10:36 12 And they seem to be articulating like a super standard
10:36 13 of -- I fear that other cases and other authorities that have
10:36 14 found processors' descriptions to -- even in instances where
10:36 15 the "processor" term invokes 112(6), that no claim would
10:36 16 survive.

10:36 17 What else is needed other than a physical description of
10:36 18 processor, algorithmic disclosure corresponding to the function
10:36 19 in question and an explicit tether of the "processor" term
10:36 20 itself to that functional language?

10:36 21 If this doesn't suffice to -- under a clear and convincing
10:37 22 indefiniteness standard, I would fear that they're flipping the
10:37 23 standard on its head and putting the onus on patent -- on the
10:37 24 patentee to disprove an indefiniteness theory.

10:37 25 That's not the standard. That's not the law. And we

10:37 1 think the burden rests with them. It's a high burden, and it
10:37 2 has not been met.

10:37 3 THE COURT: Anything else?

10:37 4 MS. HARTENSTEIN: Well, Your Honor, just quickly.

10:37 5 They seem to argue that there's some categorical rule that
10:37 6 we're trying to propose about whether processor would invoke
10:37 7 Section 112(6).

10:37 8 There's not, nor would I propose one today. It's really a
10:37 9 case-by-case evaluation: Analyzing the claim language, other
10:37 10 intrinsic evidence, applying the principles of Williamson and
10:37 11 its progeny, like this Court has done in its tentative
10:37 12 construction.

10:37 13 The rest of what Mr. Mangrum has said, I do believe our
10:37 14 briefs have addressed those points. Thank you.

10:37 15 THE COURT: I rarely do this, but I will -- I'm -- you all
10:38 16 have been -- done a good job of not confusing, but I think that
10:38 17 both sides make compelling arguments.

10:38 18 You will -- we will get -- I'll have my clerks let you
10:38 19 know in the next day or so what we're going to do with this
10:38 20 claim term.

10:38 21 And so let's move on to the next one. Give me one second.

10:38 22 Okay. Yeah. I mean, we've spent -- probably of all the
10:38 23 claim terms, that was the one we spent the most time trying to
10:38 24 get right. So it was -- we thought it was a difficult one. So
10:38 25 give me one second.

10:38 1 The next claim term to take up is "client management
10:38 2 processor configured." And, again, for the same reason as the
10:38 3 last one, this one is one that will be started with
10:39 4 Mr. Mangrum.

10:39 5 (Clarification by the reporter.)

10:39 6 MR. MANGRUM: What would we do without that helpful
10:39 7 prompting? Thank you. And thank you also for your e-mail and
10:39 8 reminding me to do that before the hearing even started.

10:39 9 So Brett Mangrum for plaintiff. And I am sharing my
10:39 10 slides, the same slide deck. Here we're starting at Slide 16.
10:39 11 And for the sake of efficiency, we intend to address the
10:39 12 "processor" terms of Claim 9 collectively.

10:39 13 They're all recited in the same claim. We're calling them
10:39 14 the "processor" terms in that they are all -- all three terms
10:39 15 recite "processor configured to." However, they're recited in
10:40 16 unique context in the sense that there's qualifying terms
10:40 17 preceding each "processor configured to."

10:40 18 And we've -- as you can see here on Slide 16, like for
10:40 19 Term No. 3 -- and these are the numberings the parties used for
10:40 20 briefing purposes -- the "client manager" -- "management
10:40 21 processor" is the first term, a "detection processor" is the
10:40 22 second term, and then a "collaborative application management
10:40 23 processor" is the third term.

10:40 24 Now, as set forth in our briefing, those qualifying terms
10:40 25 are important in the sense that it helps because the concept of

10:40 1 processors that are specifically dedicated to certain purposes
10:40 2 is disclosed in the '585 patent. The patent uses qualifying
10:40 3 terms to be able to differentiate between processors.

10:40 4 So, again, in each instance, a processor's not referring
10:41 5 to all -- just a black box processor in general. Rather, these
10:41 6 claim nomenclature, this qualifying language is intended to
10:41 7 invoke the -- or simply reflect the corresponding description
10:41 8 in the specification.

10:41 9 So when you see "client management processor," that's what
10:41 10 you should look for in the specification, something that's
10:41 11 referred to as client management or detection or collaborative
10:41 12 application, et cetera.

10:41 13 And what we did then in our analysis, following the same
10:41 14 instructive authority of the cases we cited, including Optis
10:41 15 and others, is look at the intrinsic evidence and see what the
10:41 16 specification states with respect to those processor terms, how
10:41 17 they're described. And then in view of that explain why the
10:41 18 defendant has not met its burden to show that there is -- and
10:41 19 their theory, again, is that there's no structure.

10:41 20 And here, again, there wasn't an argument in the briefing
10:42 21 at least that there's a lack of structure because there must be
10:42 22 algorithmic structure.

10:42 23 The briefing simply focuses on the argument that there is
10:42 24 no structure, algorithm or otherwise. There's just nothing in
10:42 25 the specification that could be attributed to a structure.

10:42 1 And keep in mind in this instance, in interpreting how the
10:42 2 specification would be understood from a person of ordinary
10:42 3 skill in the art, all that the defendant offers is attorney
10:42 4 argument.

10:42 5 And our position is not that you must in all instances
10:42 6 have expert testimony to support a conclusion of indefiniteness
10:42 7 when you're considering whether the terms invoke
10:42 8 means-plus-function, whether or not there's sufficient
10:42 9 structure disclosed. That's not our position.

10:42 10 But our position is this: The dispute here is unique in
10:42 11 that you're asking whether or not the intrinsic evidence --
10:42 12 there could -- whether or not the intrinsic evidence discloses
10:43 13 what a person of ordinary skill in the art would understand to
10:43 14 be reasonably certain structure.

10:43 15 And to have that perspective and to be able to interpret
10:43 16 what is disclosed and what's tethered to these functional
10:43 17 requirements and suggest, "ignore this disclosure or this is
10:43 18 not enough, this disclosure's not enough or this one's not
10:43 19 enough," based off of attorney argument is problematic for
10:43 20 defendants in view of the standard of clear and convincing
10:43 21 evidence.

10:43 22 That's the point we raised is that under the particular
10:43 23 circumstances of this case where they are attempting to
10:43 24 interpret what is disclosed in the specification and saying
10:43 25 either, A, it's not tethered or, B, it's not structured, or

10:43 1 it's not what someone skilled in the art would understand to be
10:43 2 definite structure, that's an attorney argument based off a
10:43 3 factual interpretation that's within the purview of expert
10:44 4 report. That's one of the problems they have.

10:44 5 So I've -- moving on to Slide 18. I've reemphasized this
10:44 6 point from Optis that I'm highlighting now on the slide,
10:44 7 whether the claims and specification provide specific
10:44 8 connection and interaction of the claimed processor with other
10:44 9 structural components.

10:44 10 And so we address this in our briefing with respect to
10:44 11 examples. And I haven't summarized here everything that's in
10:44 12 our briefing, but it's important to recognize that Claim 9
10:44 13 expressly recites the client management processor term as, one,
10:44 14 structurally tied to an electronic message client.

10:44 15 And there's been no dispute as to -- at least in that --
10:44 16 as recited in the claim that that's structure.

10:44 17 And, two, enabling the user to select an electronic
10:44 18 message from the inbox where the plurality of electronic
10:44 19 messages are qualified as being stored in a message storage
10:44 20 database, that database also being a structural component. We
10:45 21 have no expert testimony to confirm otherwise.

10:45 22 Claim 9 also with respect to the detection processor term
10:45 23 recites that term in an interactive context with other
10:45 24 structural components of the term. And this is expressed, for
10:45 25 example, in the requirement that it must be configured to

10:45 1 detect the action defined in the archiving rule assigned to the
10:45 2 selected electronic message was carried out.

10:45 3 And our point raised in the briefing was the detection
10:45 4 processor logically cannot detect the action was carried out --
10:45 5 that's a requirement recited -- unless the detection processor
10:45 6 is structurally tied to at least the portion of the
10:45 7 communication system carrying out that action.

10:45 8 Logically, one flows from the other. How do you make a
10:45 9 detection, a real-world detection in the absence of having some
10:45 10 type of interrelationship with other real-world components?

10:46 11 So, again, this is relevant to the Optis analysis when you
10:46 12 look at claim language and look at interactions with other
10:46 13 structural components.

10:46 14 Referring now specifically to the first of the three
10:46 15 terms, the '585 patent specification expressly ties certain
10:46 16 exemplary structure to the alleged functional language for
10:46 17 client management processor.

10:46 18 What we've done in Slide 17 is highlight the e-mail
10:46 19 client, right? It resides at a specific location within the
10:46 20 system. It houses messages. It's described structurally as
10:46 21 having certain algorithm structure and features. And this --
10:46 22 with respect to Figure 1, it sits at the top left-hand side of
10:46 23 the figure.

10:46 24 The '585 patent expressly ties certain exemplary structure
10:46 25 to the alleged functional language for the client management

10:46 1 processor, as shown in Slide 18 at Column 4, Lines 8 through
10:46 2 23.

10:46 3 I won't read this into the record, but it's clear that
10:47 4 there's a description of the electronic message client to
10:47 5 enabling the user, among other things, to select a message from
10:47 6 the inbox to be transferred. That's one of the functional
10:47 7 requirements according to defendant's interpretation of
10:47 8 means-plus-function construction.

10:47 9 But then it says more precisely and goes on to explain how
10:47 10 this can be effected according to the example embodiment. You
10:47 11 don't have a black box that merely reflects the claim language
10:47 12 but rather exemplary disclosure directed to how this could be
10:47 13 effected.

10:47 14 Now, obviously for the purposes of slide presentation,
10:47 15 it's difficult to put the entire disclosure relevant to the
10:47 16 client management processor within a slide.

10:47 17 Our point here is simply to state that it's not our burden
10:47 18 to defend the definiteness of a claim that the Patent Office
10:47 19 issued. It's defendant's burden to prove their theory that
10:47 20 there is no structural disclosure.

10:47 21 And that's plainly false when you have explicit disclosure
10:47 22 directed to the elements that are expressly attributed to the
10:48 23 functional language and that there's an exemplary disclosure of
10:48 24 how the functional language is to be effected.

10:48 25 So the only thing you could get to is not that there's

10:48 1 nothing disclosed, but somehow according to attorney argument
10:48 2 only, it's not enough.

10:48 3 What we've done then in Slide 18 is highlight the
10:48 4 structure we identified corresponding to the detection
10:48 5 processor term. We identified this structure as corresponding
10:48 6 to the detection processor term because that's what the patent
10:48 7 does.

10:48 8 Now, I recognize here it might be a little difficult from
10:48 9 the perspective of the slide. So what I'm going to do with my
10:48 10 screen is zoom in a little bit so you can maybe read it better.

10:48 11 The intent here is to simply emphasize for the Court in
10:48 12 our briefing we identified Elements 14a, 14a, 14c and 14d,
10:48 13 various agents operating according to the description in the
10:48 14 specification as performing the alleged functional language for
10:49 15 the detection processor.

10:49 16 Let me scroll back out so you can see the entire slide.

10:49 17 Moving on to Slide 20.

10:49 18 We identified exemplary disclosure within the '585 patent,
10:49 19 specifically attributing the detection processor functional
10:49 20 language to these different agents, 114a to 114d, that are
10:49 21 disclosed in the structural context within the figure we just
10:49 22 showed.

10:49 23 The first appears at the bottom of Column 5, and then it
10:49 24 ultimately extends to the top of Column 6. And reading into
10:49 25 the record the overall description, it says, "Periodically, or

10:49 1 when the electronic message client 2 is closed by the user, the
10:49 2 archiving rule is transmitted to the communication system 1 to
10:49 3 be stored in the database 116. The message will be moved when
10:50 4 the action contained in the archiving rule is detected by the
10:50 5 communication system 1."

10:50 6 Then moving on to Column 6, Lines 1 through 14, and I
10:50 7 won't read the whole thing, but I want to emphasize a few
10:50 8 points that are highlighted here.

10:50 9 Again, reading from Slide 12 (sic), "Detection of the
10:50 10 performance of an action is rendered possible by using
10:50 11 different agents, 114a to 114d, as mentioned above that control
10:50 12 the different means of the communication system."

10:50 13 Then it says more precisely, and it goes into the
10:50 14 differentiation between 14a and 14d -- or -- well, 14a, b, c
10:50 15 and d -- in providing a more precise description of how they
10:50 16 operate under certain circumstances to detect by the
10:50 17 communication system when the action contained in the archiving
10:51 18 rule is affected.

10:51 19 So, again, what I show on Slide 20 is a portion of the
10:51 20 specification directed to 14a. Slide -- scroll down here.

10:51 21 Slide 21 then addresses the 14b and provides exemplary
10:51 22 disclosure under certain embodiments of how the 14b can
10:51 23 operate.

10:51 24 Slide 22 addresses 14d. And we have a description here
10:51 25 also -- I believe this is 14c on Slide 28.

10:51 1 And so our point, Your Honor, is to simply say that while
10:51 2 we pointed to the specific structural elements that the
10:51 3 specification directly attributes to the functional language in
10:51 4 question, in each instance there's exemplary description
10:52 5 associated with each one of those agents in describing how they
10:52 6 operate and interoperate with other components of the system.

10:52 7 To reach the conclusion that there is no structure
10:52 8 disclosed, one would simply have to look past all the
10:52 9 structural description of the agents and how they operate and
10:52 10 also look past the explicit tethering within the specification
10:52 11 itself of this exemplary disclosure to the functional language,
10:52 12 the tethering being affected by use of the same qualifying
10:52 13 terms appearing before the processor terms in question in Claim
10:52 14 9, I believe it is. And using that same terminology within the
10:52 15 specification. And then also discussing the functional aspects
10:52 16 of Claim 9 in the context of those specific structural
10:52 17 components.

10:52 18 Okay. And then, finally, the collaborative application
10:52 19 management processor. Your Honor, this -- I'm on Slide 24 now
10:53 20 and I'm also showing an excerpt of Figure 1 of the '585 patent.

10:53 21 Highlighted on Slide 24 are the various databases that
10:53 22 appear connected to the collaborative agent 14 -- sorry --
10:53 23 114c. Included there is the Wiki 107, the blog 108, the FAQ
10:53 24 109, RSS 110, task 111 and planning 112.

10:53 25 And it shouldn't be surprising that in each one of these

10:53 1 instances, these structural database components are described
10:53 2 in turn and in terms of their operations and how they affect
10:53 3 their respective purposes. These are explicitly tethered in
10:53 4 the figure and in the descriptions to the collaborative agent
10:53 5 interoperate within this overall system.

10:53 6 And, again, they're characterized as databases. And we
10:53 7 have no evidence, other than attorney argument only from
10:54 8 opposing counsel, that these databases themselves do not
10:54 9 connote structure.

10:54 10 We would submit that the term "database" is a known
10:54 11 term in the art. It's a known term to connote structure, and
10:54 12 it's not used any differently here in the '585 patent than it
10:54 13 is just in general in terms of a structural term known in the
10:54 14 competing arts.

10:54 15 And, in fact, this is confirmed by use of -- and I'm going
10:54 16 to use my mouse here over Slide 24 -- symbolically use of this
10:54 17 cylinder form is a symbolic representation of a database. It's
10:54 18 referred to as a database. It's drawn as a database. Its
10:54 19 operations are described in the context of a database. We
10:54 20 submit that that's the structure, the database structure.

10:54 21 And the corresponding description, again, is tethered to
10:54 22 the functional language. It uses the same qualifying terms
10:55 23 "collaborative application" in describing those databases.

10:55 24 And because of that explicit tethering, the commonality in
10:55 25 the language and the recitation of structure, including its

10:55 1 operation under example embodiments, we submit that for this
10:55 2 term, like all other of the disputed terms claims of Claim 9,
10:55 3 that you simply -- it's indefensible to say that there is no
10:55 4 corresponding structure. And that's why it's indefinite.

10:55 5 There is corresponding structure. And we submit that
10:55 6 what's disclosed is sufficient and that the defendant has not
10:55 7 met the burden of clear and convincing evidence in view of what
10:55 8 the specification discloses.

10:55 9 And with that, I'll stop sharing. And I can take
10:55 10 questions, but that's our presentation for today, Your Honor.

10:55 11 THE COURT: Okay. If I could hear a response from Google.

10:55 12 MR. LANIER: Yes, Your Honor. Tracy Stitt will respond on
10:55 13 this term. Thank you.

10:55 14 MS. STITT: Thank you, Your Honor. Tracy Stitt for
10:55 15 Google.

10:55 16 And much like Ms. Hartenstein with respect to this term,
10:56 17 we accept the Court's preliminary construction. And with the
10:56 18 presentation that we just heard, I didn't hear any new
10:56 19 arguments that weren't presented in the briefs. And we feel
10:56 20 that our briefs fully address those arguments, and those
10:56 21 arguments were fully accounted for in Your Honor's preliminary
10:56 22 constructions.

10:56 23 With that being said, unless you have specific questions,
10:56 24 I'd like to respond on a few points.

10:56 25 First, in terms of the requirement for an algorithm, I

10:56 1 direct you to Page 25 of our opening brief where we did, in
10:56 2 fact, make the argument that there was no algorithm disclosed
10:56 3 for these particular terms. So I wanted to correct the record
10:56 4 on that.

10:56 5 Second, you heard a lot from Mr. Mangrum about qualifying
10:56 6 terms in -- with respect to these particular means -- or these
10:56 7 particular terms. And I direct you -- he had Slide 11, his
10:56 8 Slide 11 where he referred to the client management processor
10:56 9 and the detection processor.

10:56 10 The qualifying terms that he relies on really are not
10:56 11 structural descriptors, and we said this in our brief.

10:57 12 Client management and detection merely describe the
10:57 13 function that is attributed to those processors. It does not
10:57 14 give you any structural detail, nor do the claims explain
10:57 15 anything as to how those functions are achieved.

10:57 16 The assertion that the client management processor is
10:57 17 structurally tied to an electronic message client in and of
10:57 18 itself is not sufficient to disclose structure to avoid the
10:57 19 presumption -- or to avoid the application of 112(6). And I
10:57 20 would direct you to the Media Rights case for that proposition.

10:57 21 Similarly, with respect to the detection processor,
10:57 22 detection is not a structural connotation. It simply describes
10:57 23 a function.

10:57 24 They didn't make any similar argument with respect to the
10:57 25 last processor, the collaborative application management

10:57 1 processor in terms of the claims itself.

10:57 2 Similarly, as Ms. Hartenstein said, I believe that we have
10:57 3 addressed their arguments with respect to the requirement of
10:57 4 expert testimony here. We do not believe that expert testimony
10:58 5 is required. And, in fact, the citations that they make to
10:58 6 their specification demonstrate that it is apparent that
10:58 7 there's no structural description for these terms. And, in
10:58 8 fact, they are only described in terms of their function.

10:58 9 To address Slide 17 through 25 where Mr. Mangrum
10:58 10 pointed to particular cites from the specification. Some of
10:58 11 these are a little more detailed than what we saw in their
10:58 12 briefs, but we believe that these have all been sufficiently
10:58 13 addressed in our briefing. And they all -- regardless, they
10:58 14 all suffer from the same substantive laws, and they add nothing
10:58 15 to the substance.

10:58 16 And the problem is that nothing in the spec, in fact,
10:58 17 describes anything other than the function of these particular
10:58 18 processors.

10:58 19 For example, if we look at Slide 20 that Mr. Mangrum put
10:59 20 up, he discusses the detection processor and he relies on
10:59 21 language that talks about the detection processor is
10:59 22 rendered -- excuse me. "Detection of the performance of an
10:59 23 action is rendered possible by using different agents." This
10:59 24 is at 6 -- Column 6, Lines 1 through 14.

10:59 25 And it goes on to describe that "regular analysis by such

10:59 1 agents enables detection of the events effected on such means."

10:59 2 All that does is describe the function of this processor. It

10:59 3 does not explain any structural detail with respect to the

10:59 4 processor in terms of circuitry or provide any other

10:59 5 explanation as to how that processor operates. And we know

10:59 6 from the case law that that is what is required here.

10:59 7 And for that reason, as we've stated in our briefs, for

10:59 8 none of these three terms does there exist a disclosure of

10:59 9 sufficient structure.

10:59 10 If Your Honor has any particular questions, I would be

10:59 11 happy to answer them. Otherwise, I think the arguments have

10:59 12 been addressed in our briefs.

10:59 13 THE COURT: Mr. Mangrum, any response?

11:00 14 MR. MANGRUM: Yes, Your Honor. Thank you for the

11:00 15 opportunity.

11:00 16 I want to share my screen, and I want to read into the

11:00 17 record exactly what the defendant said in its briefing because

11:00 18 I think there's a misrepresentation today of what was said.

11:00 19 So I have that now. This is -- I just pulled up their

11:00 20 brief, and I've highlighted the section I want to read into the

11:00 21 record.

11:00 22 Their argument in their briefing on the page that was just

11:00 23 cited is, "Instead, the specification simply repeats each

11:00 24 claimed function, but it does not provide any algorithm or

11:00 25 other structure for carrying out that specific function."

11:00 1 So we understood from their argument that there wasn't --
11:00 2 this -- the claim language did not invoke like a WMS Gaming or
11:00 3 Aristocrat type of discussion. They never raised that. We
11:00 4 thought it didn't either, and so we didn't address that in our
11:00 5 briefing.

11:00 6 They did not say, "it must disclose an algorithm and other
11:01 7 structure," or they didn't just -- if -- the problem is they're
11:01 8 reading this statement now as if they never said "or other
11:01 9 structure." And they're reading it as if they said the
11:01 10 specification simply treats each claimed function, but it does
11:01 11 not provide any algorithm, period.

11:01 12 That's not what they said. It's not what they argued.
11:01 13 And so naturally in our response we addressed it based off --
11:01 14 because they're the party with the burden -- based off what
11:01 15 they argued.

11:01 16 If Your Honor feels that this term somehow invokes
11:01 17 WS Gaming or Aristocrat and that there needs to be some type of
11:01 18 algorithmic structure disclosed in addition to the specific
11:01 19 structural components that we identified, then we would submit
11:01 20 that that would probably be appropriate for supplemental
11:01 21 briefing because it wasn't briefed by Google.

11:01 22 And then also -- I just want to point out when they
11:01 23 cherry-picked from the slides that we showed, the slides
11:02 24 were -- not every slide was intended for the same purpose.

11:02 25 We showed slides first of all to establish that there was

11:02 1 an explicit tethering or connection between the particular
11:02 2 component, the structural component identified in the
11:02 3 disclosure in the specification to the functional language in
11:02 4 question.

11:02 5 And it stands to reason that in those instances, this --
11:02 6 I've written hundreds of patents, and it's normal practice when
11:02 7 you are introducing a term that you intend to match up with
11:02 8 certain claim language that you match the claim language. You
11:02 9 write the term, and you match the claim language, and then what
11:02 10 follows is additional corresponding description under certain
11:02 11 example embodiments.

11:02 12 So to show that certain structural components are
11:02 13 explicitly tied to the alleged functional language, we pointed
11:03 14 to instances in the specification where this is so. But then
11:03 15 following that, we identified other instances of exemplary
11:03 16 disclosure.

11:03 17 And I agree. I think the record reflects that our
11:03 18 presentation today is an accurate summary of the briefing and
11:03 19 that the record and the intrinsic evidence speaks for itself.

11:03 20 If you just do a control F on the structural components we
11:03 21 identified, you'll see them referenced throughout the
11:03 22 disclosure, each one of them in the context of the description
11:03 23 of example embodiments describing how those particular
11:03 24 components operate, what they do, what they are, where they're
11:03 25 located and how they interact with other components.

11:03 1 In view of that disclosure, to reach the conclusion that
11:03 2 there's no structure at all, we submit, again, it's just not
11:03 3 consistent. And to the extent Your Honor wants to entertain a
11:03 4 separate disclosure -- or sorry -- a separate dispute as to
11:03 5 whether or not an algorithmic disclosure is necessary, we would
11:04 6 submit it's extraneous to the present briefing, and that would
11:04 7 warrant additional supplemental briefing.

11:04 8 MS. STITT: Your Honor, if I may respond briefly.

11:04 9 THE COURT: Yes, ma'am.

11:04 10 MS. STITT: With respect to whether there is -- an
11:04 11 algorithm is required, this is a computer-implemented
11:04 12 invention.

11:04 13 The functions that are described by these processors are
11:04 14 special-purpose functions. And so, therefore, I think that --
11:04 15 to say that an algorithm may not be required or that we didn't
11:04 16 suggest that it would be belies the record.

11:04 17 And second, with respect to the slides, I'm happy to go
11:04 18 through each of them in more detail to explain why what's cited
11:04 19 on those slides fails to explain any structural detail or
11:04 20 describe these processors in anything other than functional
11:04 21 language.

11:04 22 There's no disclosure as to how the particular processor
11:04 23 performs or operates so as to accomplish the function. It's
11:04 24 merely described in terms of the function itself, and that is
11:04 25 insufficient under either Step 1, to determine whether there is

11:05 1 a means-plus-function analysis that should be applied, or Step
11:05 2, which is once you get there, whether there's sufficient
11:05 3 structure disclosed in the specification.

11:05 4 THE COURT: Anything else?

11:05 5 MR. MANGRUM: None from the patent owner. Or sorry. From
11:05 6 the plaintiff, Your Honor. And I appreciate the opportunity.

11:05 7 THE COURT: You're very welcome. I'll be back in a few
11:05 8 seconds.

11:05 9 (Pause in proceedings.)

11:08 10 THE COURT: If we can go back on the record.

11:08 11 The Court is going to maintain its preliminary claim
11:08 12 constructions with respect to all of those arguments on
11:08 13 Claim 9, which I think leaves us with one final argument on the
11:08 14 579, "client-side compositing of media streams."

11:08 15 Mr. Mangrum?

11:08 16 MR. MANGRUM: Yes, Your Honor. I'll be arguing this term
11:08 17 as well.

11:08 18 For this one, I think it might be helpful just to do a
11:08 19 side-by-side comparison of Claims 1 and 7. If I can share.

11:09 20 Your Honor, if you can confirm that this is not too small
11:09 21 a text to be able to see.

11:09 22 THE COURT: Well, that's a little hurtful. No.

11:09 23 (Laughter.)

11:09 24 THE COURT: No. It's fine. Actually, my reading
11:09 25 eyesight's great. Not so good long-distance driving, but I

11:09 1 still can read without glasses. So I'm in good shape. Thank
11:09 2 you.

11:09 3 MR. MANGRUM: Well, just to be clear, my -- when I share
11:09 4 this in this way, I don't see exactly what you're seeing. So I
11:09 5 wanted to be certain. But thank you for confirming that.

11:09 6 So what I've done here is try to highlight using different
11:09 7 coloring a slide-by-slide comparison of Claims 1 and 7. This
11:09 8 is -- so we've moved on to a different case. This is the 579
11:09 9 case. It's the '180 patent.

11:09 10 And what's important to recognize here for the '180 patent
11:09 11 is that these various method claims are expressly written from
11:09 12 the perspective of a particular device. This is not disputed.
11:10 13 You can see that in both parties' briefings.

11:10 14 So in Claim 7, there's a method for client-side
11:10 15 compositing of media streams by a video server. Okay? And
11:10 16 then the method instead in Claim 1 is appropriately directed to
11:10 17 operations by a video display device.

11:10 18 What I've highlighted within the body of the claims for
11:10 19 Claim 7 is that after every operative gerund that introduces a
11:10 20 step, like generating, multiplexing, transmitting, there's a
11:10 21 comma and then an affirmation of what's clear in the preamble,
11:10 22 which is that all these things are done by a video server.

11:10 23 If anything, the portion of the preamble that should be
11:10 24 limiting is "via video server."

11:10 25 Why? Because in each instance in the body of the claim,

11:11 1 the word "the video server" derives its antecedent basis from a
11:11 2 video server. And it's explicit for each step that's required
11:11 3 what component is doing it because after -- again, after the
11:11 4 gerund, it says "by the video server."

11:11 5 Now, you juxtapose this with the context of Claim 1. So
11:11 6 to emphasize the distinction I've colored differently -- maybe
11:11 7 it'll come out on your screen somewhat orange -- of instances
11:11 8 where "by a video display device" or "the display device" is
11:11 9 emphasized.

11:11 10 So in each instance when you have an operative gerund
11:11 11 introducing a step, here it's receiving, demultiplexing and
11:11 12 displaying, the -- it looks like I missed one. I should have
11:11 13 highlighted this orange as well, right here after receiving.

11:11 14 But in every instance what you have is an antecedent
11:12 15 reference to the preamble requirement, "by a video display
11:12 16 device." And in every instance you have specifically called
11:12 17 out what component is doing the step.

11:12 18 Now, the displaying step is of particular importance, and
11:12 19 I've highlighted this yellow to emphasize that after it says
11:12 20 "displaying, by the video display device," there's the
11:12 21 statement, "the at least one media substream on the display
11:12 22 screen according to the compositing-instruction substream. The
11:12 23 compositing-instruction substream, including instructions on a
11:12 24 composition of the at least one media substream."

11:12 25 So you have to do the compositing at the video display

11:12 1 device because it's recited, right?

11:12 2 Now, why is that significant? When you -- we start with a
11:12 3 preamble assessment with the presumption that the preamble's
11:13 4 not limiting, and the -- or a portion when you bifurcate
11:13 5 selections of a preamble. Because we don't dispute that "via
11:13 6 the video display device" is limiting because it's the thing
11:13 7 that provides antecedent basis for each instance of "the video
11:13 8 display device."

11:13 9 But just to suggest client-side compositing is of itself
11:13 10 an additional limitation would overlook the fact that what you
11:13 11 have here in Claim 1 is a specific reference to the compositing
11:13 12 in accordance with the instructions of the
11:13 13 compositing-instruction substream.

11:13 14 So in instances where you have specific elements within a
11:13 15 claim, claim language that calls out something that's
11:13 16 introduced in a preamble, that further underscores the
11:13 17 presumption that the preamble's not limiting. And that in this
11:13 18 case, the phrase in question is directed to a purpose of the
11:14 19 method because you have specific claim language directed to the
11:14 20 compositing.

11:14 21 Now, look at what happens instead over at the Claim 7.

11:14 22 So Claim 7 you have -- you generate by video server, you
11:14 23 multiplex by the video server and you transmit. And what are
11:14 24 you transmitting by the video server? You're transmitting the
11:14 25 multiplex data stream to be displayed on the display screen

11:14 1 according to the compositing-instruction substream, but therein
11:14 2 you're done, right?

11:14 3 All the steps here are recited in the context of the video
11:14 4 server. When you transmit, that transmission is all that
11:14 5 Claim 7 requires. It doesn't have, unlike Claim 1, additional
11:14 6 limitations directed to client-side compositing, right?

11:14 7 So the patentee, when he wanted steps within a body of a
11:14 8 claim to refer to client-side compositing, they're explicitly
11:15 9 recited.

11:15 10 Here, to remove all doubt from the -- of the perspective
11:15 11 of -- the patentee -- sorry. I'm -- it's like I'm redrafting a
11:15 12 brief in my head as I speak.

11:15 13 But the patentee here on Claim 7 could have just said "the
11:15 14 method comprising," right? And often that's what you see for
11:15 15 preamble phrases.

11:15 16 But instead to be -- make it very clear, what should
11:15 17 already be clear in the language of the claim that each step is
11:15 18 performed by the video server, what you see here in the
11:15 19 preamble itself is saying this method is effected by a video
11:15 20 server.

11:15 21 How do you know that? Because each step also says "by the
11:15 22 video server."

11:15 23 So when you transmit the multiplex data and, of course,
11:15 24 perform the preceding steps recited in Claim 7, to suggest then
11:15 25 and thereafter more is required to infringe Claim 7, we feel

11:15 1 would be a departure from what is recited in Claim 7,
11:16 2 particularly in view of Claim 1.

11:16 3 And an analysis of these claims side by side is important.
11:16 4 Courts often do this. They often do this because under the
11:16 5 Doctrine of Claim Differentiation and other claim construction
11:16 6 doctrines, the recitations in one claim could be informative as
11:16 7 to the interpretation in other claims.

11:16 8 We've seen that today. We've seen that when you have
11:16 9 instances where means-plus-function construction -- or
11:16 10 limitations are recited in one claim and not another. Other
11:16 11 claims are recited in Beauregard format. This underscores
11:16 12 distinctions that are evident in the claim.

11:16 13 So here there could be no question that there's a
11:16 14 distinction at least in the context of perspective. It's made
11:16 15 explicit in the preamble.

11:16 16 And we would submit that once the generating multiplexing
11:16 17 and transmitting is done by the video server, all these are
11:16 18 intended for the purpose of client-side compositing. But
11:16 19 that's what happens. The video server transmits this when
11:16 20 other things -- because of the way things are generated,
11:17 21 because of the way things are multiplexed, and because of the
11:17 22 way things are transmitted, this all facilitates client-side
11:17 23 compositing.

11:17 24 But it doesn't then further require a user to turn on
11:17 25 their computer or to drink a cup of coffee or to, you know, log

11:17 1 onto the Internet. Like while all those things might happen,
11:17 2 ultimately what's set forth in the claim is the claim
11:17 3 requirements.

11:17 4 And we've heard in other briefings and in arguments, oral
11:17 5 arguments before Your Honor, that the name of the game is the
11:17 6 claim, and that's true here.

11:17 7 This recites three steps. There's not a fourth step. And
11:17 8 to suggest Claim 1 recites what would effectively be another
11:17 9 operative gerund ignores the -- that the call-out within the
11:17 10 claim language itself, that the compositing-instruction
11:17 11 substream is what provides the instructions for the compositing
11:17 12 when it says according to the compositing-instruction
11:18 13 substream.

11:18 14 I wanted to make certain that these points from our
11:18 15 briefing were clear. And I'm happy to address any questions
11:18 16 Your Honor has.

11:18 17 But, again, our focus in our briefing was on a comparative
11:18 18 analysis between Claims 1 and 7 and an emphasis on what the
11:18 19 claim language itself says these steps are effected by.

11:18 20 And I'll stop sharing.

11:18 21 MR. LANIER: Your Honor, Sanjiv Laud will respond for
11:18 22 Google. Thank you.

11:18 23 MR. LAUD: Good morning, Your Honor.

11:18 24 Could we start with Slide 15, please?

11:18 25 Your Honor, I just want to start by noting that the fact

11:19 1 that the server claims in this patent -- and Claim 7 isn't the
11:19 2 only one -- recite client-side compositing is evidence of how
11:19 3 important client-side compositing is to the invention here. It
11:19 4 appears in every preamble of every claim of the patent.

11:19 5 I think what you heard today from Mr. Mangrum is that the
11:19 6 plaintiff believes there's an inconsistency behind applying the
11:19 7 requirement of client-side compositing to the server-side
11:19 8 claim. And I want to demonstrate to you how that's not
11:19 9 inconsistent.

11:19 10 Let's go to Slide 16 for the moment.

11:19 11 This is from the specification of the patent, Your Honor.
11:19 12 It's Figure 1 showing the system having a video server and a
11:19 13 video display device. You can think of this as DirecTV and
11:19 14 YourTV, for example.

11:19 15 The specification explains that instead of compositing all
11:19 16 the data streams at the video server as was done in the prior
11:20 17 art as described in the first column of the patent, the video
11:20 18 display device composites and displays at least one of the
11:20 19 media streams.

11:20 20 So you have these two components operating in tandem. You
11:20 21 have your video server, which is wrapping up and bundling all
11:20 22 of the media streams as well as a descriptor substream that
11:20 23 tells you what's in there and the compositing-instruction
11:20 24 substream that is the fundamental essence of the invention.

11:20 25 And then on the other side you have the video display

11:20 1 device which receives all of that and, unlike the prior art,
11:20 2 composites the video at the video display device.

11:20 3 Let's go back to the previous slide so we can look at the
11:20 4 claim language.

11:20 5 There is nothing inconsistent with applying the limiting
11:20 6 phrase from the preamble "client side compositing of media
11:21 7 streams" with the rest of this claim. This claim is directed
11:21 8 to the functions that are shown in that Figure I just showed
11:21 9 you and described in much more detail in the specification.

11:21 10 It's generating the compositing-instruction substream.
11:21 11 It's multiplexing that with the descriptor substream and the
11:21 12 media substreams. And then it's transmitting that to the
11:21 13 client device to be displayed on the display screen.

11:21 14 There's nothing inconsistent about the server performing
11:21 15 the intended functions in this system, preparing them to be
11:21 16 composited on the client side.

11:21 17 And I want to be clear about how we understand that. I
11:21 18 think Mr. Mangrum is saying we are trying to import an
11:21 19 additional method step into this claim. I don't think that's
11:21 20 the right way to understand it.

11:21 21 What we're saying, Your Honor, is that the compositing
11:21 22 can't happen at the server side because it must be client-side
11:21 23 compositing. That's the whole purpose of the invention. That
11:22 24 is the invention of this patent, as I think we made clear in
11:22 25 our briefs.

11:22 1 So I don't believe there's any inconsistency in saying
11:22 2 that the last limitation here "transmitting by the video server
11:22 3 the multiplex data stream to be displayed on the display
11:22 4 screen" means that that is to be composited and displayed on
11:22 5 the display screen by the client-side device. That's how we
11:22 6 understand the claim.

11:22 7 We don't dispute that a server could in theory infringe
11:22 8 this claim without need of a step being performed on a
11:22 9 client-side device. We're not trying to make that type of
11:22 10 divided infringement argument, or that there has to be control
11:22 11 over both portions of the device. That's not the purpose of
11:22 12 our argument here, Your Honor.

11:22 13 It's simply to clarify that the whole invention of this
11:22 14 patent is client-side compositing as opposed to server-side
11:22 15 compositing. And we believe that fits naturally with Claim 7
11:22 16 as drafted.

11:22 17 If Your Honor has any other questions, I'm happy to answer
11:23 18 them. Otherwise, we'll rest on our briefs.

11:23 19 THE COURT: That was very well done.

11:23 20 Mr. Mangrum?

11:23 21 MR. MANGRUM: Yes. Thank you, Your Honor.

11:23 22 Just a couple of points. Our position is not then that
11:23 23 their interpretation is inconsistent. It has been that the
11:23 24 transmitting step -- let me share, again, so we can walk
11:23 25 through the claim language one last time.

11:23 1 Okay. This transmitting step is the last step. You just
11:23 2 heard that from opposing counsel, and we agree. When the
11:23 3 server transmits -- this is the video server -- when it
11:23 4 transmits the multiplex data stream to be displayed at some
11:23 5 future time, I believe opposing counsel just used the words "to
11:23 6 prepare for compositing." We agree that's the last step.

11:23 7 Once the transmitting occurs, what is required -- and
11:23 8 provided the generating and multiplexing has occurred, once
11:24 9 the -- what opposing counsel referred to as the transmitting,
11:24 10 the last step, once that occurs, that's all that was required.

11:24 11 And so it's not a question of whether or not is it
11:24 12 consistent if the client side does compositing. It's whether
11:24 13 you have to further add, in addition to the transmitting, a
11:24 14 compositing by the video display device the transmitted
11:24 15 multiplex data stream. That's effectively what they're asking
11:24 16 to Court to do.

11:24 17 And we submit -- and you just heard from the other side
11:24 18 that transmitting's the last step.

11:24 19 Once the video server transmits, there need not be a
11:24 20 separate and additional compositing step. And we know that
11:24 21 partially because of the way when the tables are flipped --
11:24 22 sorry. I said tables. What I mean is perspective.

11:24 23 When the perspective switches to the video display device,
11:24 24 you're not preparing to display, right? You are displaying
11:25 25 based off what had been transmitted.

11:25 1 So Claim 1 is a little bit different in that because of
11:25 2 its unique perspective, it talks about what happens after the
11:25 3 transmission occurs, and that includes discussion of the
11:25 4 compositing data stream.

11:25 5 So the fact that all of these claims reference this
11:25 6 overarching purpose does not mean that then becomes a claim
11:25 7 limitation. When the compositing at the video display device
11:25 8 is a claim limitation, it's called out.

11:25 9 When in Claim 7 the transmitting being the last step is
11:25 10 executed, that's all that's required.

11:25 11 And so our construction has simply been: Follow the claim
11:25 12 language and nothing extraneous to the claim language is
11:25 13 required.

11:25 14 MR. LAUD: If I may, Your Honor, just a brief response.

11:25 15 THE COURT: Of course.

11:26 16 MR. LAUD: On Claim 7 let me just note, I think there's a
11:26 17 little confusion. At least I'm confused as to what the
11:26 18 plaintiff is arguing. It seems they're either arguing that the
11:26 19 claim doesn't require any compositing at all, which doesn't
11:26 20 make sense with the invention, or they're saying that
11:26 21 server-side compositing is encompassed by the claim language
11:26 22 contradicts the purpose of the invention, and as we said in our
11:26 23 briefs, just about everything in the patent.

11:26 24 So I'm not sure which of those it is, but I don't think it
11:26 25 matters because --

11:26 1 Could we look at Slide 10?

11:26 2 -- you don't look at the claim language in isolation. We
11:26 3 cited a case in our responsive brief. It's Corning Glassworks,
11:26 4 Page 32 of our response brief.

11:26 5 The Federal Circuit has told us whether a claim preamble
11:26 6 is limiting can only be resolved on review of the entire patent
11:26 7 to understand what the inventors actually invented and intended
11:26 8 to encompass by the claims.

11:26 9 And we think in this case it's very clear what we would
11:27 10 call the Poly-America test is satisfied here. This case is on
11:27 11 all fours with the Federal Circuit's decision in Poly-America.

11:27 12 The specification of this patent is replete with
11:27 13 references to client-side compositing. It is the title of the
11:27 14 invention. It's the first sentence of the abstract. It's the
11:27 15 summary of every embodiment. There is no embodiment that does
11:27 16 not involve client-side compositing. It's repeated in every
11:27 17 claim.

11:27 18 It's clear from all of that the inventors considered this
11:27 19 to be important, and beyond important, a fundamental
11:27 20 characteristic of the invention. It's not just an intended use
11:27 21 or purpose. It is the invention, and, therefore, it's properly
11:27 22 construed as a limitation of the claim itself.

11:27 23 With that, Your Honor, nothing further from Google. Thank
11:27 24 you.

11:27 25 THE COURT: Mr. Mangrum?

11:27 1 MR. MANGRUM: Yeah. I don't know if Your Honor shares the
11:27 2 same confusion, but I want to at least address the point that
11:27 3 was raised if that would be helpful. And it is that it's
11:27 4 not -- we're not making the argument that you have to do
11:28 5 server-side compositing under Claim 7. That's not the
11:28 6 position.

11:28 7 The position is that the claim does not have any explicit
11:28 8 requirements post-transmission, right? And I think we heard a
11:28 9 concession on that point today. So you can't do client-side
11:28 10 compositing prior to transmitting, and transmitting is the last
11:28 11 step.

11:28 12 Now, these types of steps operating in cooperation with
11:28 13 each other, the generating, multiplexing and transmitting are
11:28 14 all set up to facilitate what is expressed as a purpose in the
11:28 15 preamble, and that occurs thereafter. And I think that point's
11:28 16 now uncontested.

11:28 17 But to suggest Claim 7 further requires, in addition to
11:28 18 these three steps, compositing does not comport with the claim
11:28 19 language.

11:28 20 We would also submit, Your Honor, that there is a lot of
11:28 21 authority -- and I'm sure Your Honor's aware of it -- where
11:29 22 there's no legally recognizable reducing something down as an
11:29 23 essential element or a gist or heart of the invention. And one
11:29 24 example is the Allen case. That's 299 F.3d 1336.

11:29 25 And also let me give you another citation, Ormco Corp.,

11:29 1 498 F.3d 1307. And there the Federal Circuit said, "This Court
11:29 2 has rejected a claim construction process based on the essence
11:29 3 of an invention." And so -- and that was a 2007 case.

11:29 4 So to suggest, okay, transmitting's the last step, but we
11:29 5 want all the claims to further require an additional and
11:29 6 unrecited step because client-side compositing somehow is the
11:29 7 essence or gist of the invention.

11:29 8 It is already, I think, defeated by the concession that
11:29 9 transmitting is the last step but also is inconsistent with
11:29 10 authority that says you don't add claim limitations that aren't
11:30 11 recited ostensibly because those are necessary or the gist or
11:30 12 the heart of the invention.

11:30 13 Claim language controls for Claim 7. There's no
11:30 14 compositing. For Claim 1 there is in the displaying step. And
11:30 15 so to suggest we should add and import limitations from a
11:30 16 non-limiting aspect of the preamble we submit is not consistent
11:30 17 with the plain and ordinary meaning.

11:30 18 MR. LAUD: Your Honor, I think the argument amounts to
11:30 19 don't believe your lying eyes. The --

11:30 20 THE COURT: Can you all give me just one second?

11:30 21 MR. LAUD: Of course.

11:30 22 (Pause in proceedings.)

11:30 23 THE COURT: Okay. Thank you, sir.

11:30 24 You can continue, please.

11:30 25 MR. LAUD: Thank you.

11:31 1 The Federal Circuit has made clear that the essence of the
11:31 2 invention is important. In fact, that's pretty much one of the
11:31 3 most important aspects of the patent for determining whether a
11:31 4 preamble's limiting.

11:31 5 I would point Your Honor to the Vizio case that we cited
11:31 6 in our briefs. That's 605 F.3d 1330 at 1341, where the Federal
11:31 7 Circuit concluded on very similar technology that decoding in
11:31 8 an MPEG-2 transport stream was the essence or a fundamental
11:31 9 characteristic of the claimed invention, and, therefore, even
11:31 10 though it was a preamble, it was a limitation of the claims.

11:31 11 Thank you.

11:31 12 THE COURT: You're welcome. Thank you.

11:31 13 I'll be back with you all in a few seconds.

11:31 14 (Pause in proceedings.)

11:32 15 THE COURT: If we could go back on the record, please.

11:32 16 The Court is going to maintain its preliminary
11:32 17 construction that the claim term is limiting.

11:32 18 A couple of things to take up: One, we will get out a
11:32 19 resolution in the next day or so of the one claim term I've
11:32 20 left up in the air. And we'll get that done very quickly.

11:32 21 I'll just pick on Mr. Mangrum because I can see your face
11:32 22 right in front of me.

11:32 23 Do we have a trial date set in this case yet?

11:32 24 MR. MANGRUM: Yes. We do, Your Honor.

11:32 25 THE COURT: And how many patents do we have set in this

11:32 1 case?

11:32 2 MR. MANGRUM: Let me confirm.

11:33 3 15, Your Honor.

11:33 4 THE COURT: So here's what I would like you all to do.

11:33 5 Mr. Lanier, I'll put you in charge, but of course -- hold
11:33 6 on one second.

11:33 7 Okay. Apparently the first trial is set for March, a
11:33 8 year. I'd like for you all to get together. I picked on
11:33 9 Mr. Lanier, but of course you all can self-assign.

11:33 10 But we're not going to do 15 patents in a case -- I'm
11:33 11 sorry -- in a trial. We probably won't do them maybe even in
11:33 12 two trials, even though I guess patents could fall away as we
11:33 13 go through, you know, the course of everything.

11:33 14 What I would like for you all to do is -- now, let me
11:33 15 start over.

11:33 16 Mr. Lanier, you and Mr. Mangrum and others, you're all big
11:33 17 boys. If you'd say we could do 15 patents in a trial, then,
11:33 18 you know, I'll set aside enough time to do it. But my guess is
11:34 19 that's probably not what Google would want. And so -- it's not
11:34 20 what I would want if I were Google, so I'm just presuming that.
11:34 21 So I'm not sure it's -- I'm not sure it's what the plaintiff
11:34 22 wants either.

11:34 23 So if you all can get together and figure out what
11:34 24 grouping of patents -- probably if there are -- if there are
11:34 25 more than ten patents, we may need three trials even though

11:34 1 I'll be -- you know, we'll be stacking up trials at that time.

11:34 2 But for sure we can get one done.

11:34 3 I feel relatively comfortable we can do between four and
11:34 4 six patents in a trial if -- hopefully there may be a grouping
11:34 5 of technology. There may be a grouping of accused products,
11:34 6 something that tethers them together. I'll let you all take
11:34 7 the first crack in telling me what group you think makes sense
11:35 8 to go to trial first.

11:35 9 Probably what we'll do -- what we've done so far in the
11:35 10 Intel case, and it's worked -- I think it's worked well. Maybe
11:35 11 there would be disagreement among the lawyers. But what we did
11:35 12 was we kept the timing of everything, for example, all 15
11:35 13 patents the same as though they were all going to trial on that
11:35 14 March date. But we knew going in that they weren't all going
11:35 15 to be tried. And that's worked pretty well because, you know,
11:35 16 we've had *seriatim* pretrial conferences now and done other
11:35 17 things.

11:35 18 And, obviously, now that I know more about what's going on
11:35 19 in that case, it's helping me -- we had a pretrial hearing
11:35 20 yesterday that was much easier because I've been through this
11:35 21 once. We've all been through it once.

11:35 22 So we will keep everything -- for scheduling discovery
11:36 23 expert reports, everything like that, we will keep the trial
11:36 24 date as though it's all 15 patents. But I'm telling you I'm
11:36 25 not going to try 15 patents, and I would like for you all to

11:36 1 come up with a number that's between, say, four and five, six,
11:36 2 seven, something like that that you all -- both sides feel will
11:36 3 be comfortable we could try.

11:36 4 And I will give you an appropriate amount of time for
11:36 5 whatever number of patents we're trying. I think we had -- we
11:36 6 had a disagreement in trial.

11:36 7 We had 14 or 15 hours in the last trial I had. And the
11:36 8 reason I say that is because they didn't use up all the time.
11:36 9 So I don't know how much time I actually -- I can't remember.

11:36 10 But I can assure both sides I will give you adequate time
11:36 11 to try your case, depending on the number of patents you tell
11:36 12 me that we're going to be trying in that case.

11:36 13 I will set a number of hours based on the number of
11:36 14 experts you tell me you're going to have, witnesses you tell me
11:37 15 you're going to have. And I'll make sure that the plaintiff
11:37 16 has an adequate amount of time to try their case and put on a
11:37 17 short rebuttal case and that Google has an opportunity to
11:37 18 defend its case and put on its case-in-chief. So I will
11:37 19 guarantee you that.

11:37 20 So even though I'm continuing to believe -- and I'll give
11:37 21 you this, my only lecture from the bench, time -- a shorter
11:37 22 amount of time. None of you believe me. I wouldn't believe me
11:37 23 when I was on your side of the bench. Less time is better for
11:37 24 everyone. It makes things -- it makes the jury happy, and it
11:37 25 makes you all less repetitive.

11:37 1 But I want everyone on this -- I want everyone to feel
11:37 2 like they had an adequate amount of time to present their case.
11:37 3 And so I will do my very best to give you the amount of time
11:37 4 that I can, given my schedule, to give you all -- allow you to
11:37 5 try the case with as many hours as possible.

11:38 6 Is there anything -- I'll start with plaintiff's counsel.
11:38 7 Is there anything we need to take up?

11:38 8 MR. MANGRUM: This is Brett Mangrum for plaintiff. And
11:38 9 not at this time, Your Honor. Thank you for your time.

11:38 10 THE COURT: Mr. Lanier?

11:38 11 MR. LANIER: Your Honor, thank you for that. Thank you
11:38 12 for that guidance. Only -- we agree with the approach Your
11:38 13 Honor's outlined. That makes good sense to us. We'll work
11:38 14 with Mr. Mangrum and team to come to a proposal.

11:38 15 My only question -- and it's guessing, I understand, that
11:38 16 is. Does Your Honor have a sense if we were to, say, have
11:38 17 three trials, are they going to be back to back to back or
11:38 18 staged out by a month --

11:38 19 THE COURT: No. I can tell without any equivocation, they
11:38 20 will not be back to back. I don't think it's -- number one,
11:38 21 it's not fair to you guys. It's not fair to your clients, and
11:38 22 it's not fair to you all.

11:38 23 Number two, when I -- by March of 2022, we have plenty to
11:38 24 do already in March. We have plenty to do already in April.
11:39 25 And I -- what I will tell you all, I'm going to try and figure

11:39 1 out as I learn what I'm doing, I guess our trial in the first
11:39 2 Intel case -- gosh, I lost track. The next one's in April.
11:39 3 If I feel like I did not give them enough time between
11:39 4 trials to get ready, then I will probably spread the -- you
11:39 5 know, by a month or so -- I think I gave two or three months
11:39 6 between. In this case, given the number of patents there are,
11:39 7 I might make sure there was like, say, at least two or three
11:39 8 months, you know, between the trials to make sure that you all
11:39 9 had adequate time to get ready for the next trial and do other
11:39 10 things in your life that you have to do professionally and all
11:39 11 that.

11:39 12 So I will be very -- I will have much -- they will not be
11:39 13 back to back. I will have much more real-world experience
11:39 14 next -- when we're setting them next -- you know, when I start
11:40 15 setting them to have an idea of what's the fairest thing to you
11:40 16 all to do. And so...

11:40 17 MR. LANIER: Your Honor, thank you for that. We
11:40 18 appreciate that really clear guidance. That helps us plan.

11:40 19 I join Mr. Mangrum in thanking Your Honor for the time and
11:40 20 leave you only with the testimony that my team will tell you
11:40 21 that I am a fervent believer in time limits and page limits,
11:40 22 and we will make it work.

11:40 23 So thank you, Your Honor.

11:40 24 THE COURT: Well, time limits are -- I just cannot tell
11:40 25 you how much better off you are by limiting what you're doing.

11:40 1 It's putting -- even if I didn't give you time limits, I would
11:40 2 tell you all to impose self-time-limits. It's so much better
11:40 3 for the jurors.

11:40 4 But you all continue to say almost every hearing --
11:40 5 Mr. Jones can tell me if I'm lying because I think he's been on
11:40 6 dozens of these hearings now -- I try and say this at every
11:40 7 hearing. The reason when the press continues to question why I
11:41 8 handle so many patent cases, I don't think anyone enjoys
11:41 9 handling them more than I do.

11:41 10 I know Mr. Jones would say there are judges in the Eastern
11:41 11 District who enjoy them as much and are certainly probably
11:41 12 better at handling than I am. But the lawyers, every time I
11:41 13 have a hearing, are exceptional. It's a real credit to your
11:41 14 clients, the quality of lawyers I get in every single case.
11:41 15 This was no exception. It's the very best lawyers.

11:41 16 And every hearing I have, I have to prepare very hard for
11:41 17 because it's like a final exam over and over with the very best
11:41 18 lawyers in America and all across America.

11:41 19 You know, I don't think any federal judges, other than,
11:41 20 again, some in the Eastern District and maybe in Delaware, have
11:41 21 the breadth of national lawyers that I do in my court on a --
11:41 22 you know, on an every-hearing basis. And I take great pride in
11:42 23 that and what we've done in the court. And so this was another
11:42 24 example of why I have the best job in the world.

11:42 25 So you all have a -- it's not Friday, is it? It's

11:42 1 Thursday.

11:42 2 Despite that, it's been a long week. I've had a lot of
11:42 3 Markmans and other hearings already.

11:42 4 You all have a wonderful rest of the week. Have a great
11:42 5 weekend. I look forward to seeing you hopefully in person in
11:42 6 the very near future. Take care.

7 (Hearing adjourned at 11:42.)

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1 UNITED STATES DISTRICT COURT)

2 WESTERN DISTRICT OF TEXAS)

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4 I, Kristie M. Davis, Official Court Reporter for the
5 United States District Court, Western District of Texas, do
6 certify that the foregoing is a correct transcript from the
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8 I certify that the transcript fees and format comply with
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11 Certified to by me this 29th day of March 2021.

12

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